TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 376.

ELIZABETH NOBLES, BY HER NEXT FRIEND, W. W. BAUGHN, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED MAY 17, 1897.

(16589.)

V

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorables the judges of the supreme court of the State of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity or the said State in which a decision could be had in said suit between Elizabeth Nobles, by her next friend, W. W. Baughn, plaintiff in error, and the State of Georgia, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or

2 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

April 15th, 1897.
Filed in office Apr. 21, 1897.

Z. D. HARRISON,
C. S. C., Ga.

3 UNITED STATES OF AMERICA, ss:

To The State of Georgia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the

supreme court of the State of Georgia, wherein Elizabeth Nobles, by her next friend, W. W. Baughn, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

4 On this 20th day of April, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Cuyler Smith before me, the subscriber, Z. D. Harrison, clerk of the supreme court of Georgia, and makes oath that he delivered a true copy of the within citation, on this April 20, 1897, to Frank Callaway, private sec'ty of Hon. W. Y. Atkinson, governor of Georgia, at the executive office, in the capitol in Atlanta, the said governor of Georgia being absent from and beyond the limits of the State.

CUYLER SMITH.

Sworn to and subscribed the 20 day of April, A. D. 1897.

[SEAL.] Z. D. HARRISON,
Clk. S. C. Ga.

Due and legal service of the within and foregoing citation on writ of error in case of Elizabeth Nobles, by W. W. Baughn, next friend, etc., vs. State of Georgia, is hereby acknowledged, and all further service in said case is waived.

This April 20, 1897.

J. M. TERRELL,
Attorney-General of the State of Georgia and of Counsel for Deft. in Error.

Filed in office Apl. 21, 1897.

Z. D. HARRISON,
C. S. C. Ga.

5 To Honorable Edward D. White, Associate Justice of the United States Supreme Court, assigned to the fifth judicial circuit:

The petition of W. W. Baughn, here appearing as next friend of Elizabeth Nobles, she being now insane and mentally incapacitated to take any steps in her own behalf, respectfully showeth the following facts:

1. Petitioner and said Elizabeth Nobles are citizens of Georgia and of the United States.

2. Said Elizabeth Nobles is now confined in the common jail of Bibb County under a conviction for murder in the superior court of Twiggs County at a special term of said court held in July, 1895, at which term she was indicted, tried, and convicted of murder, and upon the verdict of guilty was sentenced to death by the court, which sentence was legally

superseded, pending certain proceedings in the courts, till the 23rd day of June, 1896, when she was brought again into said superior court of Twiggs County to be sentenced to death, at which time petitioner, acting in her behalf as her next friend, she being mentally incapacitated at the time to take any steps in her own behalf, objected to the imposition by the court of the sentence of death upon her, for the reason that she was then insane, and objected in open court by written motion, duly verified and supported by affidavits, which objections and motions the court then and there overruled; and the court then and there imposed upon the said Elizabeth Nobles the sentence of death, fixing the date of her execution for August 7th, 1896. Both of said counties are in the western division of the southern district of Georgia.

3. And immediately after the imposition of said sentence of death, petitioner, acting in behalf of said Elizabeth Nobles as her next friend, she being mentally incapacitated at the time to take any steps in her own behalf, objected to the execution of said sentence of death upon her, for the reason that she was then insane, and objected in open court by
6 written motion, duly verified and supported by affidavits, which objections and motion the court then and there overruled and denied.

4. There is a provision in the law of Georgia for the trial of the issue of insanity raised in capital cases after conviction, and is contained in section 4666 of the Code of Georgia (1882), which section is as follows:

"If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found, by the inquisition of such jury, that such convict is insane the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution to the presiding judge of the district, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had. And at any time thereafter when it shall appear to the said presiding judge, either by inquisition or otherwise, that the said convict is of sound mind the said judge shall issue a new warrant directing the sheriff to do execution of the said sentence on said convict at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant and other proceedings in the case to be entered on the minutes of the superior court."

5. The said motions, one presented prior to and in abatement of judgment, and the other subsequent to judgment and in abatement of execution, averred that said Elizabeth Nobles was then insane, and alleged in substance that said section 4666 did not constitute a judicial tribunal for the trial of such issue, and did not afford due process of law for that purpose:

7 (a) Because due process of law is law administered in a judicial tribunal, and this is not a judicial tribunal.

(b) Because it is essential to due process of law that a jury be empanelled in the court where the conviction was had, and where the jurisdiction of the crime and the criminal is and remains.

(c) Because the trial of the question is a function of the superior court of Twiggs County, where the conviction was had, and a trial in said court is essential to due process of law.

(d) Because the inquisitorial proceedings contemplated by said section do not take place in any court of Georgia.

(e) Because no rules of evidence or method of procedure and for the drawing, summoning, and empaneling a jury and for the subpœnaing and examination of witnesses is provided.

(f) Because no judge or presiding officer is charged with the function of ruling in or out such evidence as may be tendered for the ascertainment of insanity.

(g) Because no judge or presiding officer is provided by said inquisitorial proceedings to instruct the jury on the law of the issues raised and involved.

(h) Because the law provides no method of moving for a new trial before said inquisition or of correcting any errors which may take place in said proceedings.

(i) Because said proceeding is one not known to the common law for the ascertainment of the facts involved, according to the settled principles of the law of the land.

(j) Because the supreme court of Georgia has held that said proceeding is not a judicial proceeding, but is a mere inquisition from which there is no appeal.

(k) Because no manner of review whatever is permissible from the findings of said inquisition.

8 (l) Because the proceedings before said inquisition do not take place in any court in the due course of the administration of justice.

(m) Because by the settled principles of the common law the ascertainment of the fact of sanity or insanity, at any stage of the proceedings in a legal investigation, was a function of the trial court; that is, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or before or after judgment, or after conviction and before execution; and that the settled and orderly course of procedure was the summoning of a jury and the trial of this issue under the forms of law by the introduction of evidence under the rulings of the judge of said court, whose duty it was to instruct the jury upon the law of the issues involved, and to aid them in making a verdict.

6. Petitioner then and there, acting in behalf of said Elizabeth Nobles as aforesaid, in said written motions to the court, further alleged that each and every one of said proceedings, as well as the right to the court's process for compel[illegible]g the attendance of witnesses and the right to all the other processes and proceedings usually incident to trials in the superior courts of the State, was essential to due process of law for the ascertainment of the truth of the issue of insanity tendered to the court, and was essential to due process of law within the meaning of the Constitution of the United States, thus making these distinct claims among others as constitutional rights and exceptions, viz:

(a) Said section of the Georgia Code, 4666, does not establish a judicial tribunal and does not afford due process of law.

(b) It is the constitutional right of said Elizabeth Nobles to have a trial on the issue of insanity raised under the proceedings presented and tendered for that purpose, at any stage of the proceedings, and par-
9 ticularly either before judgment or after, and to have such trial in the court having jurisdiction of her and her case; and a denial of such right is a denial of and will deprive her of her life without due process of law.

(c) It is an inalienable right and immunity of said Elizabeth Nobles not to receive judgment or execution while insane, and a denial of such trial and proceedings is a denial and abridgement of Elizabeth Nobles' rights, privileges, and immunities as a citizen of the United States, claiming all of said rights, privileges, immunities, processes, and proceedings, and making such exceptions for the said Elizabeth Nobles as a citizen of the United States under its Constitution, and particularly by virtue of the 14th amendment of the Constitution of the United States.

7. Petitioner shows that from the judgment of the court overruling and denying said motions he, as next friend of said Elizabeth Nobles, tendered a bill of exceptions and secured thereon a writ of error to the supreme court of Georgia, carrying up to the latter court for review all the records and proceedings in said case, where on March 12th, 1897, a judgment was rendered affirming the judgment of the superior court of Twiggs County.

8. Petitioner shows that said writ of error was secured on July 9th, 1896, and that since said time and pending the hearing of said case in the supreme court of Georgia said death sentence was superseded and suspended till on April 3rd, 1897, the judge of the superior court of Twiggs County in vacation and at chambers fixed the 23rd day of April, 1897, as the day for the execution of said sentence and the infliction upon said Elizabeth Nobles of the penalty of death.

9. Petitioner presents with this application a complete and certified transcript of the record of said case in the supreme court of Georgia, and a transcript showing the proceedings in the superior court
10 of Twiggs County subsequent to said judgment of affirmance by the supreme court of Georgia. To all of said records reference is prayed.

10. Petitioner says that said decision of the supreme court of Georgia was adverse to the claims of petitioner made for said Elizabeth Nobles, and that said court is the highest court of law or equity in said State in which a decision could be had between petitioner, next friend for said Elizabeth Nobles, and the State of Georgia.

Wherefore, the premises considered, petitioner prays that a writ of error be issued out of the Supreme Court of the United States, directed to the supreme court of the State of Georgia, requiring the latter court to certify and send up to the former court all the records and proceedings in said case, to the end that justice may be done in the premises and the aforesaid judgment of the supreme court of Georgia may be reversed and declared null and void, and that such other orders and judgments may

be had, and such other proceedings in that behalf, as may be proper and necessary.

This April 10th, 1897.

W. W. BAUGHN,
Next Friend of Elizabeth Nobles, by his Attorneys,
MARION W. HARRIS,
W. C. GLENN,
D. W. ROUNTREE.

Writ of error allowed as prayed for, to operate as a supersedeas, and returnable according to law upon bond being furnished in the sum of two hundred and fifty dollars approved according to law.

This April 15, 1897.

JOHN M. HARLAN,
Associate Justice of the United States Supreme Court.

Filed in office April 21, 1897.

Z. D. HARRISON, *C. S. C. Ga.*

11 W. W. BAUGHN, NEXT FRIEND of Elizabeth Nobles, *vs.* THE STATE OF GEORGIA. | Writ of error from the United States Supreme Court to the supreme court of Georgia.

Know all men by these presents that we, W. W. Baughn, as principal, and J. F. Means, as surety, are held and firmly bound unto the defendant, the State of Georgia, in the full and just sum of two hundred and fifty dollars to be paid to said defendant and its proper officers, attorneys, and agents, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this April 15th, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately at the supreme court of the State of Georgia, in a suit pending in said court between said W. W. Baughn, as next friend of Elizabeth Nobles, plaintiff in error, and the State of Georgia, defendant in error, a judgment was rendered against said W. W. Baughn, as next friend of Elizabeth Nobles, and the said W. W. Baughn, next friend as aforesaid, having obtained a writ of error from the Supreme Court of the United States, intending to urge the same and file a copy thereof in the clerk's office of the said supreme court of Georgia to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Georgia, citing and admonishing the said State of Georgia to be and appear at a session of the United States Supreme Court to be held at the Capitol in the city of Washington, D. C., thirty days from the date of the allowance and issuance of said writ of error:

Now, the condition of the above obligation is such that if the said W. W. Baughn, next friend as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make the

said plea good, then the above obligation to be void, else to remain
12 in full force and virtue.

W. W. BAUGHN. [SEAL.]
By his attorney MARION W. HARRIS.
J. F. MEANS. [SEAL.]

Sealed and delivered in presence of—
W. H. BURDICK,
W. E. DUNWOODY,
Not. Pub., Bibb Co., Ga.
[SEAL.]

Approved by—
EMORY SPEER, *U. S. Dist. Judge.*

This bond approved this April 17th, 1897.

JOHN M. HARLAN,
Asso. Justice S. C. U. S.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, H. H. King, clerk of the district court of the United States for the southern district of Georgia, do hereby certify that the Honorable Emory Speer, who signed and approved the above bond, is and was at the time of signing the same a judge of the district court of the United States for the southern district of Georgia, duly commissioned and qualified, and that full faith and credit ought to be given to his acts and attestations given as such.

In witness whereof I have hereto set my hand and seal of said court this fifteenth day of April, A. D. 1897.

[SEAL.] H. H. KING, *Clerk.*
By LENOIR M. ERWIN, *Deputy Clerk.*

Filed in office April 21, 1897.

Z. D. HARRISON, *C. S. C. Ga.*

13 ELIZABETH NOBLES, BY W. W. BAUGHN, next friend, plaintiff in error, *vs.* THE STATE OF GEORGIA, DEFENDANT IN ERROR. } In error to the supreme court of the State of Georgia.

Assignment of errors.

Afterwards, to wit, on May 15th in the year 1897, at the Capitol in Washington, and in the Supreme Court of the United States, comes Elizabeth Nobles, by her next friend, W. W. Baughn, and says that in the record and proceedings in the supreme court of the State of Georgia in the above-entitled cause there is manifest error in this:

(1) That the supreme court of the State of Georgia erred in affirming the judgment of the superior court of Twiggs County in denying to Elizabeth Nobles a trial by jury in said court, as a function of the said court, upon the question of sanity or insanity at the time when the issue was tendered, and before sentence was pronounced in response to the question as to why sentence of death should not be then imposed upon her.

This judgment of the supreme court of the State of Georgia, affirming the judgment of the superior court of the county of Twiggs, was a denial to Elizabeth Nobles of due process of law, such as is required by Section I, Article XIV, of the amendments to the Constitution of the United States; and the court erred in not holding and deciding that at this stage of the proceedings, before sentence was pronounced, when the issue of insanity was tendered, that it was the duty of the superior court of the county of Twiggs, and an essential to due process of law under the
14 above-cited article that the same should be tried and disposed of under the regular forms of administration of justice in the superior courts of the State of Georgia, where all issues of fact are tried by a jury under the direction of the court.

(2) That the supreme court of the State of Georgia erred in affirming the judgment of the superior court of Twiggs County, in denying to Elizabeth Nobles a trial by a jury in said court, as a function of the said court, upon the question of sanity or insanity, at the time when the issue was tendered, and after sentence was pronounced.

This judgment of the supreme court of the State of Georgia, affirming the judgment of the superior court of the county of Twiggs, was a denial to Elizabeth Nobles of due process of law, such as is required by Section I, Article XIV, of the amendments to the Constitution of the United States; and the court erred in not holding and deciding that at this stage of the proceedings after sentence was pronounced, when the issue of insanity was tendered, that it was the duty of the superior court of the county of Twiggs, and an essential to due process of law under the above-cited article, that the same should be tried and disposed of under the regular forms of administration of justice in the superior courts of the State of Georgia, where all issues of fact are tried by a jury under the direction of the court.

(3) Because the supreme court of the State of Georgia erred in holding and deciding that "there is no law of force in this State which makes it incumbent upon a judge of the superior court, at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with
or without the aid of a jury, a denial to the *the* prisoner of "due
15 process of law."

Plaintiff in error says that it is and was by the settled principles of the law of the land a right on part of a defendant charged with and convicted of a crime not to be sentenced if insane, and not to have a sentence executed if the same be imposed, and that a judicial investigation of the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, at the time when sentence is to be imposed, is an essential to "due process of law," in ascertaining whether or not said sentence should be imposed, and when imposed, whether or not the same should be enforced, and that a refusal by a judge to enter upon an investigation of this kind, with the aid of a jury or without the aid of a jury, is denial of due process of law.

(4) That the supreme court of the State of Georgia erred in holding that the provisions of the code of the State of Georgia relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

This holding was erroneous because the provisions of the code relating to inquisitions in such matters are not judicial proceedings; do not take place before any judicial tribunal; there is no judge who is to preside and rule upon the law and the evidence; there is no method of compelling the attendance of witnesses; there is no provision for a review of the proceedings; because no jury is empanelled in any court; because the trial of this sort of issue is a function of a trial court; because no rules of evidence nor methods of proceedings are provided for the drawing and summoning and empanelling of a jury; because no judge or presiding officer is charged with the duty of instructing the jury; because said proceedings are not known to the common law for the ascertainment of facts involved, and because the supreme court of the State of
16 Georgia has held that said proceedings is not a judicial proceeding, but is a mere inquisition from which there is no appeal.

For each and all of these reasons, if the proceedings contemplated by the code of the State of Georgia are sufficiently comprehensive to cover all cases where the insanity begins at any time after the rendition of the verdict of guilty, the said proceedings do not afford such due process of law as is required by Section 1, Article XIV, of the amendments to the Constitution of the United States, and the holding that there is no other method of procedure under the law of the State of Georgia is a denial of due process of law within the meaning of said Section 1, Article XIV, of the amendments to the Constitution of the United States.

(5) The supreme court of the State of Georgia erred in holding against the plaintiff in error upon the ground that it is a right, privilege, and immunity of Elizabeth Nobles not to receive judgment or execution while insane, and a denial to her of such trial and proceedings as are judicial in their character is a denial and abridgment of Elizabeth Nobles' rights, privileges, and immunities as a citizen of the United States, within the meaning of Section 1, Article XIV, of the amendments to the Constitution of the United States.

(6) Because the supreme court of the State of Georgia erred in holding that a refusal to enter upon an investigation of this kind tendered in this case, without the aid of a jury, is not a denial to the prisoner of "due process of law."

Plaintiff in error says that when the suggestion of insanity in bar of sentence is made, that it is the duty of the tribunal having jurisdiction of the case to ascertain in some mode and manner, either with or without the aid of a jury, the truth of the issue tendered, and that a refusal to ascertain in any manner is a denial of due process of law within the meaning
17 of Section 1, Article XIV, of the amendments to the Constitution of the United States.

(7) The supreme court of the State of Georgia erred in holding that a refusal to enter upon an investigation into the insanity of the prisoner when about to be sentenced, when the suggestion of such insanity

is made without the aid of a jury is not a denial to the prisoner of due process of law.

Plaintiff in error says that where according to the settled proceedings of the State for the ascertainment of matters of fact in the courts, a method other than a jury is provided, that whenever any issue is tendered involving a question of fact in a case over which a court has jurisdiction, and while it has jurisdiction, it is a denial of due process of law not to ascertain the facts in the ordinary manner provided by the law of the State, and that in this case a failure or refusal to enter upon an investigation without the aid of a jury was a denial to the prisoner of due process of law.

(8) That the supreme court of the State of Georgia erred in holding that it is no denial of due process of law for the courts of the State of Georgia and for the superior court of the county of Twiggs to refuse in any way to pass upon the issue involved, the court holding in this case that there was no duty of any character whatever upon the superior court of the county of Twiggs to investigate the issue at all, either by the judge alone or by the judge and jury combined.

(9) The supreme court of the State of Georgia erred in not reversing the judgment of the superior court of the county of Twiggs denying to defendant an investigation into her sanity, when the same was tendered both before the imposition of sentence and after its imposition, and erred in not holding and deciding that the failure of the superior court of the county of Twiggs to investigate the issue tendered both before
18 and after sentence was imposed was a denial to Elizabeth Nobles of due process of law, and a denial of a right, privilege, and immunity of the said Elizabeth Nobles as a citizen of the United States under Section I, Article XIV, of the amendments to the Constitution of the United States.

Wherefore plaintiff in error prays that the judgment of the supreme court of the State of Georgia aforesaid, may be reversed, annulled, and made to hold for nothing, and that she may be restored to all things which she has lost by reason of said judgment, etc., and that such other order, judgment, and direction be had from this honorable court to the supreme court of the State of Georgia as may be necessary and proper in the premises.

MARION HARRIS,
Macon, Ga.
W. C. GLENN,
DANIEL W. KOUNTREE,
401-2-3-4-5-6 Temple Court, Atlanta, Ga.,
Counsel for Plff. in Error.

Filed in office April 21, 1897.

Z. D. HARRISON, *C. S. C. Ga.*

19. GEORGIA, TWIGGS COUNTY:

Be it remembered that at the April term of the Superior Court of Twiggs County, said court having been regularly and legally adjourned from its regular April sitting to the 23rd day of June, 1896, at which time said court was in session, there came on to be heard before said court, his honor, C. C. Smith, judge of said court, then and there pre-

siding, the case of The State vs. Elizabeth Nobles, said case being an indictment for murder against said named Elizabeth Nobles, said indictment having been found and returned by the grand jury of said county at a special term of said court held on the 9th, 10th, and 11th days of July, 1895, at which said special term of the court said Elizabeth Nobles was tried, convicted, and sentenced upon said indictment, the court sentencing said Elizabeth Nobles to death. The said sentence of death having been regularly and legally suspended and superseded by the order of the court, the case came on to be heard before the court on said 23rd day of June, as aforesaid, for the purpose of passing the sentence of death by the court upon the said Elizabeth Nobles in said stated case. Whereupon, in open court, upon said 23rd day of June, and immediately before the sentence of death was imposed by the court in said stated case upon the said Elizabeth Nobles, W. W. Baughn, who is here the plaintiff in error, tendered and presented to the court, the said W. W. Baughn appearing in behalf of the said Elizabeth Nobles as her next friend, a certain petition or motion, of which the following is a true, correct, and exact copy, to wit:

THE STATE *vs.* ELIZABETH NOBLES.	In Twiggs superior court. Indictment, trial, and conviction for murder at July special term, 1895.

And now comes W. W. Baughn, who appears as next friend of
20 and for the said named defendant, Elizabeth Nobles, for the purpose of making this application to the court, and coming at the April term of said court being now in session on the 23rd day in June, 1896, the said named defendant being before the court for the purpose of being sentenced to death in accordance with the verdict of guilty rendered in said stated case, now by his attorneys at law, Marion Harris and Glenn & Roundtree, who are the attorneys of record in said stated case for the said Elizabeth Nobles, and before the sentence of death is passed upon her by the court, objects and says that the court should not and ought not to impose the sentence of death upon said Elizabeth Nobles for the following reasons, to wit:

1st. Because, as petitioner here avers, the said Elizabeth Nobles is now insane.

2nd. Because the said Elizabeth Nobles being now insane it is contrary to the policy of the law and is illegal that the sentence of death should be imposed upon her by the court.

And petitioner further says that under article 14 of the amendment to the Constitution of the United States it is provided as follows: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner says that due process of law means law in its regular course of administration through courts of justice, and that by the fourteenth amendment above quoted, while the States have power to deal with crime within their borders, no State can deprive any person of equal and impartial justice under the law; and that law in its regular course of administration through courts of justice is due process, and unless

the same take place through courts of justice the constitutional
21 requirement above quoted is nullified.

Petitioner, therefore, especially sets up and claims the right to due process of law through its regular administration through courts of justice, under and by virtue of the constitutional guarantee under the 14th amendment to the Constitution of the United States above quoted.

Petitioner says that it is essential to due process of law within the meaning of the above requirement that a jury be impanelled on the issue now tendered by this petition, and that trial take place before a judge of the superior court of the State of Georgia, according to the due and regular form of proceedings in our courts. Whenever an issue of fact is made in a superior court in the State of Georgia the trial of the questions thereby raised is a function of the superior court of the county having jurisdiction, and that the trial of the question raised by this petition is a function of the superior court of Twiggs County, in which said court the said Mrs. Nobles was convicted of murder.

Petitioner further says that the proceedings contemplated under section 4666 of the Code of Georgia are not due process of law for these reasons, to wit:

1st. Because the same does not take place in any court of this State.

2nd. Because no rules of evidence or method of procedure are prescribed in such inquisition, and no proper method for the drawing, summoning, and empanelling a jury, and for the subpœnaing and examination of witnesses is provided.

3rd. Because no judge or presiding officer is charged with the function of ruling in or out evidence which may be tendered on said issue.

4th. Because no judge or presiding officer is provided in said proceeding whose duty it is to instruct the jury on the law involved in
the questions raised and to make rulings on evidence which may
22 be tendered for or against the person said to be insane.

5th. Because there is no method of moving for a new trial or of correcting any errors which may take place in said proceeding.

6th. Because said proceeding is one not known to the common law in ascertaining the facts involved according to the settled principles of the law of the land.

7th. Because the supreme court of the State of Georgia has held that the said proceeding is in no sense a judicial proceeding, but is a mere inquisition from which there is no appeal.

8th. Because no manner of review whatever is permissible from the findings of said inquisition.

9th. Because the proceedings before said inquisition do not take place before a court in the due course of the administration of justice. And petitioner says that the inquisition provided for is a denial by the State of such due process of law as is guaranteed by the Constitution of the United States, and petitioner especially claims the privilege and right, under the United States Constitution, to have due process of law for the ascertainment of the truth of the issue now here tendered to the court.

Petitioner further says that by the settled principles of the common law the ascertainment of the fact of sanity or insanity at any stage of the proceedings in the course of a legal investigation was a function of the trial court; that is, of the court having jurisdiction of the crime

itself and of the criminal, whether before or after arraignment, before or after conviction, or after conviction and before execution, or before or after judgment, and that the settled and orderly course of procedure was the summoning of a jury and a trial of this issue under the
23 forms of law, by the introduction of evidence under the rulings of the judge of the said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict. And petitioner says that each and all and every one of these proceedings named, and also the right to the court's process for the compelling the attendance of witnesses to testify upon said issue, as well as such other proceedings and process and rights as are usually incident to trials before the superior courts of the State, are essential to due process of law within the meaning of the Constitution of the United States, and petitioner now here claims the right to such proceedings under and by virtue of the 14th amendment to the Constitution of the United States.

Wherefore, petitioner, now in behalf of the said Elizabeth Nobles, whom petitioner avers is mentally incapacitated because of her present insanity to take any legal steps in her own behalf, the premises considered, prays the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and impanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; and that petitioner have the right to the court's process to compel the attendance of witnesses, and to such other processes as may be right and necessary, and that said sentence be postponed and suspended till the final adjudication of the question raised by this petition.

MARION HARRIS,
GLENN & ROUNDTREE,
Attorneys for Petitioner.

24 GEORGIA, BIBB COUNTY:

In person comes before the undersigned, a notary public in and for said county, Tom W. Loyless, who, on his oath, says that the allegations of fact set forth in the foregoing petition are true.

TOM W. LOYLESS.

Sworn to and subscribed before me this June 20th, 1896.

G. H. DOLVIN,
Not. Pub., Bibb County, Ga.

After argument heard upon the said petition or motion, the court then and there passed an order denying and overruling the same upon each and every ground therein taken and set out and denying and refusing each and every prayer of said petition or motion; to which ruling, order, and judgment of the court the said petitioner or movant then and there excepted and now here excepts and assigns the same as error.

Whereupon the court then and there, notwithstanding the objections urged and set forth in said petition or motion, sentenced the said named Elizabeth Nobles to death, to be executed on the 7th day of August, 1896, to which sentence and judgment of the court over said objections urged as aforesaid, petitioner or movant, W. W. Baughn, as next friend as aforesaid, then and there excepted and now here excepts and assigns the same as error.

And be it further remembered: After the court had imposed said sentence of death upon the said Elizabeth Nobles, as aforesaid, and on said 23rd day of June, 1896, while the said court was still in session, the said W. W. Baughn, who is here the plaintiff in error, then, as next friend of the said Elizabeth Nobles, tendered and presented to the said
25 court another certain petition or motion, of which the following is a true, correct, and exact copy, to wit:

THE STATE } In Twiggs superior court. Indictment, trial, and
vs. } conviction for murder at July special term,
ELIZABETH NOBLES. } 1895.

And now comes W. W. Baughn, who appears as next friend of and for the said named defendant, Elizabeth Nobles, for the purpose of making this application to the court, and coming at the April term of said court, being now in session on the 23rd day in June, 1896, said named defendant having in open court on said named day been sentenced to death by the court in accordance with the verdict rendered in the above-stated case, the date for the execution upon the said Elizabeth Nobles of the said sentence of death having been fixed by the court for the 7th day of August, 1896, and coming now by his attorneys at law, Marion Harris and Glenn & Roundtree, who are the attorneys of record in said stated case for the said Elizabeth Nobles, respectfully sheweth to the court the following facts:

1st. That the said Elizabeth Nobles is now insane.

2nd. That being now insane it is contrary to the policy of the law and is illegal that the sentence of death this day imposed as aforesaid by the court should be executed upon the said Elizabeth Nobles.

And petitioner further says that under article 14 of the amendment to the Constitution of the United States it is provided as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Petitioner says that due
26 process of law means law in its regular course of administration through courts of justice, and that by the 14th amendment above quoted, while the States have power to deal with crime within their borders, no State can deprive any person of equal and impartial justice under the law, and that law in its regular course of administration through courts of justice is due process, and unless the same take place through courts of justice the constitutional requirement above quoted is nullified.

Petitioner therefore specially sets up and claims the right to due process of law through its regular administration by courts of justice, under and by virtue of the constitutional guarantee under the 14th amendment to the Constitution of the United States above quoted.

Petitioner says that it is essential to due process of law, within the meaning of the above-quoted requirement, that a jury be impanelled on the issue now tendered by this petition, and that a trial take place before a judge of the superior court of the State of Georgia according to the due and regular forms of proceedings in our courts. Whenever an issue of fact is made in a superior court in the State of Georgia a trial

of the questions thereby raised is a function of the superior court of the county having jurisdiction, and that the trial of the question raised by this petition is a function of the superior court of Twiggs County, in which said court said Elizabeth Nobles was convicted of murder.

Petitioner further says that the proceedings contemplated by section 4666 of the code of Georgia are not due process of law for these reasons, to wit:

1st. Because the same does not take place in any court of this State.

2nd. Because no rules of evidence or methods of procedure are prescribed in said inquisition, and no proper method for the drawing, summoning, and impanelling a jury and for the subpœnaing and examination of witnesses is provided.

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3rd. Because no judge or presiding officer is charged with the function of ruling in or out evidence which may be tendered on said issue.

4th. Because no judge or presiding officer is provided in said proceeding whose duty it is to instruct the jury on the law involved in question, and to make rulings on evidence which may be tendered for or against the person said to be insane.

5th. Because there is no method of moving for a new trial, or of correcting any errors which may take place in said proceeding.

6th. Because the said proceeding is one not known to the common law in ascertaining the facts involved according to the settled principles of the law of the land.

7th. Because the supreme court of the State of Georgia has held that the said proceeding is in no sense a judicial proceeding, but is a mere inquisition from which there is no appeal.

8th. Because no manner of review whatever is permissible from the findings of said inquisition.

9th. Because the proceedings before said inquisition do not take place before a court in the due course of the administration of justice. And petitioner says that the inquisition provided for is a denial by the State of such due process of law as is guaranteed by the Constitution of the United States, and petitioner especially claims the privilege and right, under the United States Constitution, to have due process of law for the ascertainment of the truth of the issue now here tendered to the court.

Petitioner further says that by the settled principles of the common law the ascertainment of the fact of sanity or insanity at any stage of the proceedings in the course of a legal investigation was a function of the trial court; that is, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or before or after judgment, or after conviction and before execution; and that the settled and orderly course of procedure was the summoning of a jury and the trial of this issue under the forms of law, by the introduction of evidence under the rulings of the judge of said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict. And petitioner says that each and every one of and all of these proceedings and also the right of the court's process for the purpose of compelling the attendance of witnesses to testify upon said issue, as well as such other proceedings and process as are usually incident to trials before the superior courts of the State, are essential to due process of law within the meaning of the

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Constitution of the United States, and petitioner here and now claims the right to such proceedings under and by virtue of the 14th amendment to the Constitution of the United States.

Wherefore, petitioner now in behalf of the said Elizabeth Nobles, whom petitioner avers is mentally incapacitated because of her present insanity to take any legal steps in her own behalf, the premises considered, prays the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and impanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; and that petitioner have the right to the court's process to compel the attendance of witnesses and to such other process as may be right and necessary, and that said sentence of death be suspended and superseded till the final adjudication of the question raised by this petition.

MARION HARRIS,
GLENN & ROUNDTREE,
Attys. for the Petitioner.

29 GEORGIA, BIBB COUNTY.

In person comes before the undersigned, a notary public in and for said county, Tom W. Loyless, who on oath says that the allegations of fact set forth in the foregoing petition are true.

TOM W. LOYLESS.

Sworn to and subscribed before me this 20th day of June, 1896.

G. H. DOLVIN,
Not. Pub., Bibb Co., Ga.

After argument heard upon the said petition or motion the court then and there passed an order denying and overruling the same upon each and every ground and point therein set out and taken and denying and refusing each and every prayer of said petition or motion, to which ruling, order, and judgment of the court the said petitioner or movant, the said W. W. Baughn, as next friend of the said Elizabeth Nobles, then and there excepted and now here excepts and assigns the same as error.

Upon the hearing of both of said petitions or motions petitioner read in support thereof to the court the affidavit of E. H. Fitzpatrick, which, with the formal and immaterial portions thereof omitted for the sake of brevity, is in substance and in material part as follows:

Dated May, 1896, Bibb County, Ga. Deponent is a citizen of Twiggs County, Ga., and well knows Elizabeth Nobles, who is under conviction for murder in Twiggs superior court; within the last day or two deponent has seen said Nobles and talked with her and observed her actions; that from her talk and conversation and actions and her appearance, deponent judges that said Mrs. Nobles is an insane woman; that she does not talk intelligently and has the appearance of a mental
30 imbecile. Deponent further says that from the facts above set out and for other reasons deponent says that said Mrs. Nobles is now insane. Said affidavit properly signed, executed, and attested.

Also the affidavit of S. E. Jones, which, with the formal and immaterial portions thereof omitted for the sake of brevity, is in substance and material part as follows:

Dated June 23rd, 1896, Twiggs County, Ga. Deponent well knows E. H. Fitzpatrick, of said county, who has recently made affidavit expressing opinion that Mrs. Elizabeth Nobles, convicted of murder at a July special term, 1895, of Twiggs superior court, is insane. Deponent has known said Fitzpatrick for a number of years; deponent knows his reputation for truth and veracity. Such reputation is good. From what deponent knows of that reputation, as well as from deponent's own knowledge of said Fitzpatrick, deponent would believe him on his oath, and said Fitzpatrick is a man of good character. Said affidavit properly signed, executed, and attested.

And now comes the said W. W. Baughn, as next friend of the said Elizabeth Nobles, as aforesaid, and coming within twenty days from the date of the rendition of said orders and judgments of the court complained of, and coming within the time allowed by law, tenders this his bill of exceptions and prays that the same may be signed and certified as true and correct; and that the clerk of the superior court of Twiggs County be required to make out a complete copy of such portions of the record in said case, and such portions only as are in this bill of exceptions specified, and certify the same as such, and transmit the same, together with this bill of exceptions, to the present term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

31 No evidence being introduced upon the hearing of said two motions save the two affidavits of Tom. W. Loyless, verifying the said two motions, and the affidavits of E. H. Fitzpatrick and S. E. Jones, read in support of said motions, no evidence besides that is necessary to elucidate the errors complained of.

And the said plaintiff in error hereby specifies such parts of the record in said case and such parts only as are material to a clear understanding of the errors complained of, to wit:

The order and judgment of the court denying and overruling the said motion or petition presented and tendered before the said sentence of death was imposed by the court.

The order and judgment of the court denying and overruling the said petition or motion presented and tendered after the said sentence of death was imposed.

The said sentence of death.

MARION HARRIS,
Post-office address, 556 Cherry st., Macon, Ga.,
GLENN & ROUNDTREE,
Post-office address, Temple Court, Atlanta, Ga.,
Attorneys for Plaintiff in Error.

I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Twiggs County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified,

and certify the same as such, and cause the same to be transmitted
32 to the present term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

This July 9th, 1896.

C. C. SMITH, *J. S. C. O. C.*

GEORGIA, TWIGGS CO.,
CLERK'S OFFICE, SUPERIOR COURT,
July 27, 1896.

I, D. S. Faulk, clerk of the superior court in and for the county and State aforesaid, hereby certify that the foregoing pages is the original bill of exceptions in the case of The State vs. Elizabeth Nobles, a copy of the same being retained in my office.

Witness my hand and affixed seal this 27th July, 1896.

[SEAL.] D. S. FAULK, *Clerk.*

GEORGIA, TWIGGS COUNTY.

Due and legal service of the within and foregoing bill of exceptions and writ of error acknowledged. Copy received. All other and further service and notice waived.

This 16th day of July, 1896.

TOM EASON, *Sol. Gen.*

Number seven, Oconee, October term, 1896. Elizabeth Nobles, by next friend, W. W. Baughn, vs. The State. Original bill of exceptions. Filed in office July 17th, 1896. D. S. Faulk, clerk. Filed in office July 30, 1896. Logan Bleckley, D. C. S. C. Ga. Marion Harris, Glenn & Roundtree, attys.

33 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
Atlanta, March 19, 1897.

I hereby certify that the foregoing pages hereto attached contain a true copy of the bill of exceptions in the case therein stated as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

34 Order and judgment of the court upon the motion made before the sentence was imposed by the court. At the April term, 1896.

Upon hearing the foregoing motion and the affidavits of E. H. Fitzpatrick and S. E. Jones read in support thereof, it is ordered by the court that said motion be overruled and the prayers therein refused, and such is hereby done. Let the said motion be filed in office and this order entered on the minutes.

In open court, June 23rd, 1896.

C. C. SMITH, *J. S. C.*

Entered.

Order and judgment of the court upon the motion made after the sentence of death was imposed by the court. *At the April term, 1896.*

Upon hearing the foregoing motion and the affidavit of E. H. Fitzpatrick and S. E. Jones read in support thereof, it is ordered by the court that said motion be overruled and the prayers therein refused; and such is hereby done. Let the motion be filed and this order entered on the minutes of the court.

In open court, June 23rd, 1896.

C. C. SMITH, *J. S. C. O. C.*

Entered.

35 THE STATE *vs.* ELIZABETH NOBLES. } Murder in Twiggs superior court. At July special term, 1895, and verdict of guilty.

Whereupon the verdict of the jury in the above-stated case finding you, the defendant, Elizabeth Nobles, guilty of the offense of murder, it is therefore ordered, considered, and adjudged by the court that you, the defendant, be, by the sheriff or his lawful deputy, taken from the bar of said court and safely conveyed to the jail of Bibb County, where you shall be safely and securely kept and confined until the day of your execution or such time as may be necessary to convey you to such place of execution, when you shall, by said sheriff or his lawful deputy, be taken and safely conveyed to said county of Twiggs, when you shall, on the 7th day of August, 1896, between the hours of 10 o'clock a. m. and three o'clock p. m., be, by the said sheriff or his lawful deputy, be privately hanged by the neck until you are dead. Said place of execution shall be within one-half mile of the court-house in Jeffersonville, in Twiggs Co.

The ordinary of Twiggs Co. is directed to have prepared a suitable scaffold and appliances for your execution. Said execution shall be in private and witnessed only by such clergymen, relatives, and friends as you may desire, and the executing officers, and such numbers of guards as may be necessary. It is further ordered that Drs. E. McNair and J. G. Slappey attend said execution and determine when death shall supervene. And may God have mercy on your soul.

Witness my hand and seal officially this the 23rd day of June, 1896. In open court, April adjourned term, 1896.

C. C. SMITH, *J. S. C. O. C.*

36 GEORGIA, TWIGGS COUNTY.
CLERK'S OFFICE, SUPERIOR COURT.
July 27, 1896.

I certify that the annexed and foregoing 4 pages contain a full, true, and complete transcript of the record of the case in said court, wherein the State, plaintiff, and Elizabeth Nobles, defendant, as the same appears from the records and files of said court: That Elizabeth Nobles, the plaintiff in error in said case, has paid all the costs that have accrued in said case, and given bond and security, as required by law.

I further certify that the original bill of exceptions in said case (a copy of the same being retained in my office) is this day forwarded, with this

exemplification, to the clerk of the supreme court, and that the term, 18 , of the superior court of said county was adjourned on the day of 18 .

Given under my official signature and the seal of said court.

[SEAL.] D. S. FAULK, *Clerk.*

No. 7, Oconee, October term, 1896. Transcript of record. W. W. Baughn, next friend, vs. the State. Filed in office July 30, 1896. Logan Bleckley, D. C. S. C. Ga.

37 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
Atlanta, March 19, 1897.

I hereby certify that the foregoing pages hereto attached contain a true copy of the transcript of record in the case therein stated, as appears from said transcript now of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

38 BAUGHN, NEXT FRIEND,
vs.
THE STATE.

By the court, per Cobb, justice.

1. There is no law of force in this State which makes it incumbent upon a judge of the superior court at the time when judgment is to be entered, or after it has been entered, to allow, or order, a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of "due process of law."

2. The provisions of the code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

Judgment affirmed.

All the justices concurring.

39 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
Atlanta, March 19, 1897.

I hereby certify that the foregoing page hereto attached contains a true copy of the decision of the supreme court of Georgia in the case therein stated, as appears from the original now on file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

40 SUPREME COURT OF THE STATE OF GEORGIA,
Atlanta, Ga., March 12, 1897.

The honorable supreme court met pursuant to adjournment.
Present,
The following judgment was rendered:

W. W. BAUGHN, NEXT FRIEND,
versus
THE STATE.

This case came before this court upon a writ of error from the superior court of Twiggs County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the justices concurring.
Bill of costs, $10.00.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta, March 19, 1897.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that Marion Harris, esq., paid the above bill of costs.
Witness my signature and the seal of said court affixed the day and year last above written.
[SEAL.] Z. D. HARRISON, *Clerk.*

41 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
Atlanta, March 19, 1897.

I hereby certify that the foregoing pages hereto attached contain a true copy of the entire record in the case of Baughn, next friend, vs. The State, as appears from the records and files of this office.
Witness my signature and the seal of said court hereto affixed the day and year above written.
[SEAL.] Z. D. HARRISON, *Clerk.*

42 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
Atlanta, May 4, 1897.

I hereby certify that the foregoing pages hereto attached contain the entire record and proceedings in the case therein stated, as appears from the records and files of this office.
Witness my signature and the seal of said court hereto affixed the day and year above written.
[SEAL.] Z. D. HARRISON, *Clerk.*

(Indorsement on cover:) Case No. 16589. Georgia supreme court. Term No., 376. Elizabeth Nobles, by her next friend, W. W. Baughn, plaintiff in error, vs. The State of Georgia. Filed May 17, 1897. Supreme Court U. S., clerk's office. Received May 6, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 376.

ELIZABETH NOBLES BY HER NEXT FRIEND, W. W. BAUGHN, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

CERTIFIED COPY OF THE OPINION OF THE SUPREME COURT OF THE STATE OF GEORGIA.

2 No. 7, Oconee.—October term, 1896.

BAUGHN, NEXT FRIEND,
vs.
THE STATE.

By the court, per COBB, Justice:

1. There is no law of force in this State which makes it incumbent upon a judge of the superior court at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of "due process of law."
2. The provisions of the code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

3 COBB, Justice:

At a special term of the superior court of Twiggs County in July, 1895, Elizabeth Nobles was tried for the offense of murder, and upon conviction was sentenced to death. The sentence "having been

legally suspended and superseded by the order of the court, the case came on to be heard before the court" on June 23, 1896, "for the purpose of passing sentence of death in accordance with the verdict of guilty rendered." At this term Baughn, the plaintiff in error, as the next friend of the condemned woman, appeared, and in her behalf objected to the sentence of death being passed, on the ground that she was then insane, and in his application prayed "the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and impanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; that petitioner have the right to the court's process to compel the attendance of witnesses and to such other process as may be right and necessary, and that said sentence be postponed and superseded until the final adjudication of the question." The court declined to entertain the application and refused "each and every prayer" thereof, and fixed the time for the execution of the sentence on August 7, 1896. Thereupon Baughn, in the same capacity as above stated, by petition alleged that Elizabeth Nobles was then insane, and that it was contrary to the policy of the law and illegal that the sentence of death should be executed, and prayed "that the court cause jurors to be regularly summoned and impanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court, and that petitioner have the right to the court's process to compel the attendance of witnesses and such other process as may be right and necessary, and that said sentence of death be suspended and superseded until the final adjudication of the question." The court refused to entertain the petition, and denied "each and every prayer" of the same. The error complained of is the refusal of the judge to entertain these petitions and grant the prayers therein contained, it being claimed that the question of the insanity of the convicted woman should be inquired of by a jury in the superior court according to the forms of procedure usually incident to trials in that court; that the refusal of the judge to submit this question
4 to a jury is a denial to the prisoner of due process of law, and that there is no proceeding authorized by any statute law of Georgia which amounts to due process of law in such cases, the procedure provided in penal code 1027 not being judicial in its nature. "A lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency." (Penal Code, § 35.) The section quoted clearly shows that under the law of this State no person can be legally convicted of a crime committed while in a moment of irresponsibility growing out of an unsound mind. If the person charged with the crime desires to avail himself of the provisions of this law and urge his insanity as a defense to a crime for which he stands indicted, no special plea of any character is necessary, as this defense will be allowed under the plea of not guilty. (Danforth vs. The State, 75 Ga., 614.) "Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a

special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the asylum, there to remain until discharged in the manner prescribed by law." (Penal Code, § 951.) This section secures to a person charged with a crime the right to have the question of his mental condition at the time of the trial inquired into before being required to plead to the indictment. (Long vs. The State, 38 Ga., 491.) "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity. The following oath shall be administered to the jury, to wit: 'You, and each of you, do solemnly swear (or affirm) that you well and truly try this issue of insanity between the State and A. B., now condemned to die, and a true verdict give according to the evidence, so help you God.' If it be found by the inquisition of such jury that the convict is insane, the sheriff shall suspend the execution of the sentence and make report of the inquisition and suspension of the execution to the presiding judge of the circuit, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had." (Penal Code, § 1047.) The sections above quoted embrace all of the law of force in this State which relate to the subject of an inquiry into the mental condition of a person charged with or convicted of a criminal offense. If insane at the time the act is committed he shall not be convicted. The section first above quoted gives him the right to have the question of his mental condition at this time inquired of strictly in accord with procedure usual in courts of justice in this State. Whether he be sane or insane at the time of the commission of the act, the section second above quoted provides for him a trial according to the usual rules of procedure of force in this State on the question of his mental condition at the time that he is placed on trial, and guarantees to him that he shall not be tried while he is in a condition of insanity. At every stage of the trial which an accused person could raise the question of his mental condition at common law before conviction, the law of force in this State gives the defendant the right to raise such question and accords to him an opportunity to have the question tried according to the procedure usual in the courts of the State. The question made in this record is, Can the prisoner after conviction, according to law, of a capital offense demand a trial by a jury in the superior court on the question of his mental condition in order that the insanity, if established, may operate to suspend the execution of the judgment in the case? The record shows that Elizabeth Nobles was convicted and sentenced to death in July, 1895, and that the sentence was not executed. She was called before the court in June, 1896, not for the purpose of being sentenced, because the sentence had been already imposed, but for the purpose of fixing a new time for the execution of the sentence. A person convicted of a capital offense is never sentenced under the law of this State but one time; the sentence is the conclusion of the record, and once entered the record is complete. It may be that the time fixed in the sentence expires, but the sentence stands in full force. Therefore the life of Elizabeth Nobles was absolutely forfeited by the verdict and

the judgment or sentence which was rendered in July, 1895, and if execution ever takes place it will be by virtue of this sentence,
6 though at a different time than that originally named. What is commonly referred to as a resentence is only the fixing of a new time for the execution of a sentence. The language of the penal code, section 1046, in reference to providing a time for the execution of the death sentence seems to be conclusive of the question that one sentence is all that is ever imposed in a capital case, and that that sentence is to be executed, either at the time fixed therein, or at such other time as the judge, or other lawful authority of this State, shall fix there*after*. "Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the presiding judge of the superior court where the conviction was had, on the application of the solicitor-general of the circuit, or other person prosecuting for the State, shall issue a habeas corpus to bring such convict before him; or if such convict be at large, said judge, or any judicial officer of this State, may issue a warrant for his apprehension; and upon the convict being brought before the judge, either by habeas corpus or under such warrant, he shall proceed to inquire into the facts and circumstances of the case, and if no legal reason exists against the execution of the sentence he shall sign and issue a warrant to the sheriff of the proper county, commanding him to do execution of such sentence at such time and place as shall be appointed therein, which the sheriff shall do accordingly; and the judge shall cause the proceedings to be entered on the minutes of the superior court of the county." In the case of Harris vs. The State, 2 Ga., 290, where complaint was made that the prisoner was improperly sentenced under the provisions of the law contained in the section above quoted, the court say: "The sentence was suspended by the supersedeas consequent upon the first bill of exceptions, until the same was affirmed by this court by the dismissal of the case. It was then in full force. The court below, therefore, had the right under the code, upon habeas corpus, to command the sheriff to do execution of the sentence." If we are correct in this interpretation, then, on June 23, 1896, when the prisoner was brought before the court for the purpose of being sentenced, she was already under sentence of death, the same having been pronounced in July, 1895, and therefore an application for an investigation into her mental condition could have been had according to
7 the exact terms of the law as embodied in penal code §1047, providing for such investigation; that is, she was a convict who had been sentenced to the punishment of death, and her presence before the court was simply for the purpose of fixing a time for the execution of such sentence. This being true, it is not necessary to decide what would be the right of a person who demanded an investigation into his mental condition in order to establish the fact that he became insane after verdict and before sentence. If it were necessary to decide this question it could be with propriety held that the prisoner was not entitled to be heard upon this question between verdict and sentence, because there was no necessity for such hearing. Without sentence the verdict can never be carried into effect. The moment that sentence is pronounced the right to apply for an investigation under section 1047 of the penal code is complete.

We therefore treat this as the application of a person convicted and sentenced, to have the question of her mental condition tried by a jury in the superior court, according to the forms of procedure incident to investigations in that court. Has a convict the right, after verdict and sentence, and his life according to "due process of law" thus forfeited to the State, to demand, as "due process of law," that his mental condition shall be inquired into, in order to determine whether the judgment of the court shall go into execution? "Inasmuch as the stage of criminal procedure known as pleading has been passed at the time when, after conviction, the issue as to insanity in bar of sentence is asked for, the point as to a constitutional right may not be involved." Carr's Trial of Lunatics, p. 87. In the case of Laros vs. Commonwealth, 84 Pa. St., pp. 200, 210, the court say: "The last three assignments of error raise a single question, upon the power of the court to inquire by inspection and per testes into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity, when set up as a defense to conviction, subsequent insanity can not be set in disproof of conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation.

8 The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exists at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."

It is in the power of any person interested in the prisoner to call for an investigation under Penal Code, § 1047, or the judge himself may order the investigation. The purpose of the legislature evidently was to carry out the principle referred to in the decision above quoted, and provide a method for the trial of a question which simply involved a plea to the humanity of the court to postpone the punishment of an insane person until a recovery takes place. In the case of Jones vs. The State, 13 Ala., 153, the court, in dealing with the question of insanity at the time of trial, say: "Although we are of opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which surrounds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken and try an insane man (as we think has been done in the case before us), it will present a case in which there may be a strong appeal to executive clemency."

In the case of Spann vs. The State, 47 Ga., 551, in referring to the law now contained in the Penal Code, § 1047, Judge McCay says: "The

stay for insanity seems to depend on the discretion of the judge at common law." (1 Hale, 370.) "He may call in a jury if he pleases. The whole proceeding is merely a stay of execution, and is based rather upon the public will and a sense of propriety than on any right in the prisoner. * * * The whole proceeding is rather an inquiry based on public propriety and decency than a matter of right." While the question as to whether the section under consideration was due process of law is not involved directly in the case of Carr vs. The State, 98 Ga.,
9 89, still in passing upon the right of the superior court to review a proceeding under that section by certiorari, the majority of the court recognized the proceeding as being "rather an inquiry based on public propriety and decency than upon any right of the defendant." The effect of that decision was to hold that no judicial investigation was required to be given to a person as a matter of right, and that all investigations after conviction were simply to inform the court imposing sentence as to the mental condition of the prisoner for the sole purpose of determining whether it would be consistent with public decency and propriety to take away the life of a person who had not mind enough to realize what was being done.

There being no law of force in this State which authorizes or requires the judge of the superior court to enter into an investigation of the mental condition of Elizabeth Nobles at the time and in the manner prayed for in the petition filed in her behalf, the refusal by the judge to enter into such investigation was not a denial to her of "due process of law," and there was, therefore, no error in declining to entertain such petition, and in denying "each and every prayer" therein.

Judgment affirmed.

10 CLERK'S OFFICE SUPREME COURT OF GEORGIA,
Atlanta, Ga., Nov. 4, 1897.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the supreme court of Georgia in the case therein stated.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

11 (Indorsed:) Case No. 16589. Supreme Court U. S. October term, 1897. Term No. 376. Elizabeth Nobles, by her best friend, W. W. Baughn, vs. The State of Georgia. Certified copy of opinion of supreme court of Georgia. Office Supreme Court U. S. Filed Nov. 6, 1897. James H. McKenney, Clerk.

No. 376.

Motion &c. No. 376 D. C. to advance

Filed Oct. 11, 1897.

IN THE

Supreme Court of the United States.

W. W. BAUGHN, next friend of Elizabeth Nobles,

Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error.

MOTION TO ADVANCE.

J. M. TERRELL,

Counsel for Defendant in Error.

ATLANTA, GA.:
GEO. W. HARRISON, STATE PRINTER,
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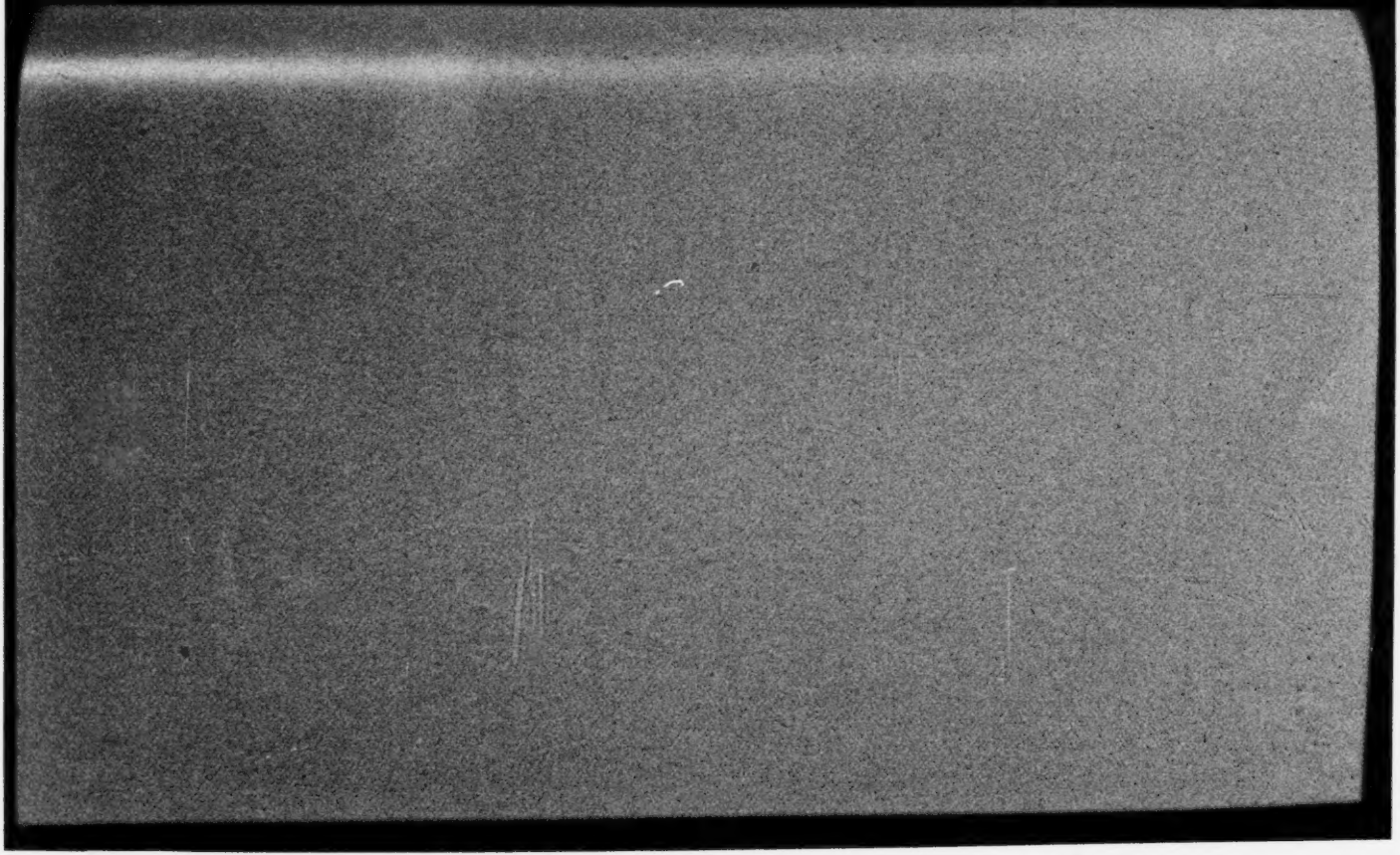

UNITED STATES OF AMERICA.

To the Honorable Supreme Court of the United States:

At a special term of the Superior Court of Twiggs County, Georgia, held on the 9th, 10th and 11th days of July, 1895, Elizabeth Nobles was tried for the offense of murder, and was convicted therefor and sentenced to death. A motion for a new trial upon several grounds, including that of insanity at the time of the commission of the crime for which she was indicted, was made, and the same was refused by said Superior Court and the case was then taken by writ of error to the Supreme Court of Georgia, pending which the said sentence was suspended as provided by the laws of that State. After the trial, conviction and sentence as aforesaid, the Judge of said Superior Court passed an order directing the Sheriff of Twiggs County to remove said Elizabeth Nobles from the common jail of Twiggs County and place her in the common jail of Bibb County, Georgia, for safe keeping, to answer the judgment and sentence of Twiggs Superior Court. In accordance with this order, S. E. Jones, Sheriff of Twiggs County, placed her in the common jail of Bibb County, R. Hines Millirons being the jailer and G. S. Westcott being the Sheriff of said County of Bibb.

On the 13th day of January, 1896, the Supreme Court of Georgia disposed of the said case by affirming the judgment of the Superior Court of Twiggs County therein. On the 18th day of January, 1896, T. W. Loyless, Asher Engle and W. W. Baughn, citizens of Bibb County, Georgia, presented to the Ordinary of that County a petition alleging that said Elizabeth Nobles was insane, and praying that a commission of lunacy be issued by him to try and deter-

mine the question of her sanity. This petition was refused by said Ordinary, and W. W. Baughn then applied to the Superior Court of Bibb County for a writ of *mandamus* requiring and demanding said Ordinary to issue said commission of lunacy. Upon the hearing of this application for *mandamus*, the Superior Court of Bibb County refused to grant same, and an appeal was then taken from the judgment refusing same to the Supreme Court of Georgia, where the judgment of the Court below was affirmed.

On January 23rd, 1896, W. W. Baughn as next friend of Elizabeth Nobles filed in the Circuit Court of the United States for the Southern District of Georgia, sitting in the Western Division, an application for writ of *habeas corpus* against said Hines Millirons, jailer of Bibb County, G. S. Westcott, Sheriff of Bibb County, and S. E. Jones, Sheriff of Twiggs County, alleging therein that said Elizabeth Nobles was in their custody and control and was insane, and that she was about "to be sentenced to death and about to be executed and deprived of life without due process of law and in violation of the 14th amendment to the Constitution of the United States." On the 4th day of February, 1896, Hon. Emory Speer, Judge, presiding in said case, ordered and adjudged that said petition be dismissed and the writ issued thereon be discharged. From this judgment an appeal was taken to this Honorable Court, and on May 4, 1896, the said case, which was No. 927, October Term, 1895, was dismissed pursuant to the 10th Rule.

On the 23rd day of June, 1896, the said Elizabeth Nobles was carried before the Superior Court of Twiggs County, Georgia, for the purpose of being sentenced to death, as provided by the laws of the State of Georgia, and when said case was called for that purpose, W. W. Baughn, as next friend of Elizabeth Nobles, presented his petition to said Superior Court, objecting to the imposing of the sentence for the following reasons, to wit:

1. Because she is now insane.

2. Being now insane, it is contrary to the policy of the law and is illegal that the sentence of death should be imposed upon her, as "due process of law" under the 14th amendment to the Constitution of the United States means law in its regular course of administration through the courts of justice, and that the same had been denied to her.

Said petition concluding with the prayer that the Court summon and impanel a jury to try and determine the question as to the sanity of said Elizabeth Nobles. After argument upon said petition and motion, the Court then and there passed an order denying and overruling same upon each and every ground therein taken, and denying and refusing the prayer thereof, to which ruling, order and judgment of the Court the petitioner excepted, and notwithstanding said objections sentenced said Elizabeth Nobles to be executed on August 7th, 1896. After said sentence was imposed, and at the same term of the Court, said Baughn, as next friend of Elizabeth Nobles, presented to the Court another petition upon grounds similar to those stated in the petition above set forth, praying that the sentence of death should not be executed. This petition or motion was likewise overruled and to this ruling or judgment petitioner also excepted. A bill of exceptions to said judgments was then presented to the Judge of said Court, which was properly certified, and the case was then taken to the Supreme Court of Georgia as provided by law, pending the hearing of which a *supersedeas* as to said sentence was granted by the Court.

On May 12th, 1897, the Supreme Court of Georgia disposed of said case by affirming the judgment of the Court below, as follows:

"W. W. Baughn, next friend, *v.* the State. By the Court, per Cobb, Justice.

"1. There is no law of force in this State which makes it incumbent upon a Judge of the Superior Court at the time when judgment is to be entered, or after it has been entered, to allow, or order, a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such Judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of 'due process of law.'

"2. The provisions of the Code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

"Judgment affirmed.

"All the Justices concurring."

Said Baughn as next friend of Elizabeth Nobles then applied to this Honorable Court for a writ of error to be directed to the Supreme Court of Georgia requiring said Supreme Court to certify and send up all the records and proceedings in said case of W. W. Baughn as next friend of Elizabeth Nobles *v.* the State of Georgia, to the end that justice may be done therein, upon the ground amongst others that due process of law was denied the said Elizabeth Nobles upon the question of her insanity, and that the judgment of the Supreme Court of Georgia denied to her the rights guaranteed by the 14th amendment to the United States Constitution, which writ of error was duly issued and served, and is now pending in this Honorable Court.

And now comes Joseph M. Terrell, Counsel for Defendant in Error, the State of Georgia, and applies to have said case advanced on the docket and heard at this term of the Court for the following reasons:

First, Because pending said writ of error no proceedings can be had or taken by the officers of the State of Georgia charged with the duty of executing the criminal laws of that State against said Elizabeth Nobles under said verdict in Twiggs Superior Court finding her guilty of murder and the sentence of the Court thereon.

Second, Because the laws of the State of Georgia against murder cannot be enforced as to said Elizabeth Nobles until said writ of error is disposed of and the questions arising thereunder determined.

Third, Because an early decision of the said case will save much expense to the parties litigant, and especially to the tax-payers of the State of Georgia, as the said Elizabeth Nobles is confined in jail under a verdict finding her guilty of murder, and therefore not bailable and will be so confined until said writ of error is disposed of.

Fourth, Because the pending of said writ of error greatly obstructs and embarrasses the State of Georgia and the officers thereof in the enforcement of the laws of said State against the crime of murder.

Fifth, Because the questions involved in said case are believed to be of public interest to the States and people generally.

For the foregoing reasons, said Defendant in Error prays the Court to advance said case so pending in this Court, and to appoint a day during the present Term for the hearing of same.

Respectfully submitted,

J. M. TERRELL,

Counsel for Defendant in Error.

Due and legal service of the above and foregoing motion to advance the case of W. W. Baughn, next friend of Elizabeth Nobles, *v.* the State of Georgia, pending in the Supreme Court of the United States, is hereby acknowl-

edged and copy of same and all further service of notice relative thereto waived, and I hereby consent for said motion to be presented at any time counsel for Defendant in Error may see proper.

This the 28th day of September, 1897.

W. C. GLENN,
Counsel for Plaintiff in Error.

No. 376.

Motion to Proceed in Forma Pauperis.

Filed Oct. 28, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 376.

ELIZABETH NOBLES, BY HER NEXT FRIEND, W. W. BAUGHN, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR.

ERROR FROM THE SUPREME COURT OF GEORGIA.

Motion for Leave to Proceed in Forma Pauperis, and that Record be Printed at Public Expense.

W. C. GLENN,
MARION W. HARRIS,
Counsel for the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-29-'97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 376.

ELIZABETH NOBLES, BY HER NEXT FRIEND, W. W. BAUGHN, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR.

ERROR FROM THE SUPREME COURT OF GEORGIA.

Motion for Leave to Proceed in Forma Pauperis, and that Record be Printed at Public Expense.

And now comes W. W. Baughn and represents to the Court that because of his poverty he is unable to pay the costs for the printing of the record and to pay the other costs in said proceeding, and that the said Elizabeth Nobles, because of her poverty, is unable to pay the costs, and that the facts of her case are fully set forth in the record now of file in the above-stated cause.

Wherefore he prays the Court that he be allowed to pro-

ceed therein *in forma pauperis* and without the payment of any costs.

W. C. GLENN,
MARION W. HARRIS,
Counsel for the Plaintiff in Error.

STATE OF GEORGIA, }
County of Bibb. }

In person comes Marion W. Harris, who, being duly sworn the truth to speak, now upon his oath says:

That he is of counsel in the above-stated case; that he well knows the said W. W. Baughn and the said Elizabeth Nobles; that the said Elizabeth Nobles is an absolute pauper, and that the said W. W. Baughn has no means within affiant's knowledge, and that to the best of his knowledge and belief the facts stated in the foregoing motion are true.

MARION W. HARRIS.

Sworn to and subscribed before me this 26th day of October, 1897.

[SEAL.] W. H. EZELL,
Notary Public, Bibb County, Ga.

[Endorsed:] Case No. 16,589. Supreme Court U. S., October term, 1897. Term No., 376. Elizabeth Nobles, by her next friend, W. W. Baughn, P. E., *vs.* The State of Georgia. Motion for leave to proceed *in forma pauperis*, and that record be printed at public expense. Filed Oct'r 28, 1897.

No. 376.

Brief of Harris & Glenn for P. E.

Filed Nov. 8, 1897.

NOV 8 1897
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 376.

Elizabeth Nobles, by Her Next Friend, W. W. Baughn,

Plaintiff in Error,

vs.

The State of Georgia,

Defendant in Error.

On Writ of Error to the Supreme Court of Georgia.

BRIEF FOR THE PLAINTIFF IN ERROR.

MARION W. HARRIS.
W. C. GLENN.
D. W. ROUNTREE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 376.

Elizabeth Nobles, by Her Next Friend, W. W. Baughn,

Plaintiff in Error,

vs.

The State of Georgia,

Defendant in Error.

On Writ of Error to the Supreme Court of Georgia.

BRIEF FOR THE PLAINTIFF IN ERROR.

MARION W. HARRIS,
W. C. GLENN.
D. W. ROUNTREE.

"'Due process of law' means law in its regular course of administration through Courts of Justice."—U. S. Sup. Ct.

"Though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for 'furiosus solo furore punitur,' and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.—Blackstone, iv, 396.

STATEMENT OF THE CASE.

Elizabeth Nobles was convicted of murder in July, 1895.

On the 23d day of June, 1896, she was brought before the bar of the Superior Court of Twiggs County, the Court where her conviction was had, to receive juegment of death.

During the interval from conviction to sentence legal proceedings were taken in her behalf with which we are not now concerned.

Upon her arraignment to receive sentence, and in response to the usual inquiry from the Court if there existed any reason in law why the sentence of death should not now be pronounced, W. W. Baughn, as her next friend, made a "suggestion upon the record" or a "plea in abatement of judgment" in the form of a motion to the Court, sworn to, and supported by other affidavits, averring that "Elizabeth Nobles is now insane"; and for that reson should not and could not, legally receive judgment of death, the motion praying for a trial before the Court and a jury of the issue thus tendered. The Court nevertheless passed sentence and fixed a date for the execution. Whereupon the same reason, viz: "She is now insane", was urged in exactly the same manner for an abatement of the *execution* and with the same prayer for a trial of the issue tendered.

Both pleas were refused by the Court and in effect were demurred out of court on the court's own motion.

The statute law of Georgia directly applicable to and involved in this controversy is as follows:

* Georgia Code (1882) 4666. *Become insane after conviction:* "If, after any convict shall have been sentenced to the punishment of death, he shall become insame, the Sheriff of the county, with concurrence and assistance of the Ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and

* The sections of the Georgia Code of 1882 are used in this brief in order to conform to the record which refers to that Code, the Code of 1895 not being completed at the time the record was made.

if it be found, by the inquisition of such jury, that such convict is insane, the Sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of said inquisition and suspension of execution to the presiding Judge of the district, who shall cause the same to be entered on the minutes of the Superior Court of the county where the conviction was had. And, at any time thereafter, when it shall appear to the presiding Judge, either by inquisition or otherwise, that the said convict is of sound mind, the said Judge shall issue a new warrant, directing the Sheriff to do execution of the said sentence on the said convict, at such time and place as the said Judge may appoint and direct in the said warrant, which the Sheriff shall be bound to do accordingly. And the said Judge shall cause the said new warrant, and other proceedings in the case, to be entered on the minutes of the said Superior Court."

Code 4666 (*a*). *Lunatics, how disposed of:* "When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisons of section 4666, of the Code, it shall be the duty of the Judge to certify the fact, and the said convict shall be received into the Lunatic Asylum, there to be safely and securely kept and treated as other adjudged insane persons."

Code 4666 (*c*). *To be hung on recovery:* "If such convict shall recover, the fact shall be at once certified by the Superintendent [of the Asylum] to the Judge of the Court in which the conviction occurred, whose duty it shall be to have the convict removed to the jail of the county in which the conviction occurred, or to some other safe jail, and shall pass sentence either in term, time, or vacation, upon the criminal, which shall be executed by the Sheriff as in other cases."

Both the pleas or motions presented on June 23rd, 1896, the one in abatement of *sentence*, and the other in abatement of *execution*, averred that, as a matter of law, the tribunal established by said section 4666 and the other sections quoted was not a judicial tribunal and did not afford "due process of law" for the determination of the issue presented;

For the reasons that:

This tribunal, as decided by the Georgia Supreme Court, is a mere inquisition and is not a court or judicial tribunal, its proceedings therefore do not take place in any court; no rules of evidence or methods of procedure are prescribed for such inquisition; no proper methods for the drawing, summoning, purging, and empanelling a jury and for the subpœnaing of witnesses by compulsory process, or for the examination of witnesses, are provided; no judge or presiding officer is charged with the function of ruling on evidence tendered or of charging and instructing a jury on the law involved; no method of moving for a new trial or of correcting errors or of reviewing its findings are provided; its proceedings constitute a method not known to the common law for the ascertainment of the facts in issue according to the settled principles of the law of the land; and its proceedings do not take place before a court in the due course of the administration of justice.

The motions each contained the averments, that:

Elizabeth Nobles is now insane, and being insane it is contrary to the policy of the law and is illegal that (in the first motion) sentence of death should be *imposed*, and (in the second motion) that, having been imposed, it should be *executed;* that it is provided by article 14 of the amendments to the Constitution of the United States as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." That "due process of law" means law in its regular course of administration through courts of justice, and that while the states have power to deal with crime within their borders, no state can deprive any person of equal and impartial justice under the law; and that law in its regular course of administration through courts of justice is due process, and unless the same take place through courts of Justice the Constitutional requirement quoted is nullified.

That it is herein specially set up and claimed that Elizabeth Nobles has the right to due process of law, in its regular adminis-

tration through courts of Justice, by virtue of the Constitutional guarantee of the 14th amendment ; that it is essential to due process of law, within the meaning of said Constitutional requirement, that a jury be empannelled on the issue of insanity tendered by the motions and that a trial thereof take place before a Judge of the Superior Court of the State of Georgia, according to the due and regular form of proceedings in the state courts ; that whenever an issue of fact is made in a court of Georgia, the trial thereof is a function of the Superior Court of the county having jurisdiction ; and a trial of the question put in issue by these motions is a function of the Superior Court of Twiggs County in which court Elizabeth Nobles was convicted of murder.

That by the settled principles of the common law the ascertainment of the fact of insanity or sanity at any stage of the proceedings, in the course of a legal investigation, was a function of the trial court, that is to say, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or after convicton and before judgment, or after judgment and before execution, and that the settled and orderly course of precedure was the summoning of a jury and a trial of this issue under the forms of law, by the introduction of evidence under the rulings of the judge of the said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict.

Each and all and every one of these proceedings named, and also the court's process for the compelling the attendence of witnesses to testify upon said issue, as well as such other proceedings and process and rights as as usually incident to trials before the Superior Courts of the the state, are essential to due process of law within the meaning of the Constitution of the United States.

The prayers of the motions were for the court to grant such rights as the motions claimed in behalf of Elizabeth Nobles.

The Supreme Court of Georgia affirmed the judgment of the

Superior Court of Twiggs County overruling these motions, holding:

(1) There is no law of force in this State which makes it incumbent upon a Judge of the Superior Court, at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of "due process of law."

(2) Sec's, 4686 et seq of the State Code relating to inquisitions in such matters, are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

The errors in the judgment of the Supreme Court of Georgia which are here in this Court asserted and relied upon, are sufficiently stated in the assignment of errors filed in the record, and are as follows:

It is contended:

(1) That the Supreme Court of the State of Georgia erred in affirming the judgment of the Superior Court of Twiggs County, in denying to Elizabeth Nobles a trial by a jury in said Court, as a function of the said Court, upon the question of sanity or insanity, at the time when the issue was tendered, and *before* sentence was pronounced, in response to the question as to why sentence of death should not be then imposed upon her.

This judgment of the Supreme Court of the State of Georgia, affirming the judgment of the Superior Court of the County of Twiggs was a denial to Elizabbeth Nobles of due process of law, such as is required by Section I, Article XIV, of the Amendment to the Constitution of the United States; and the Court erred in not holding and deciding that at this stage of the proceedings, before sentence was pronounced, when the issue of insanity was tendered, that it was the duty of the Superior Court of the County of Twiggs, and an essential to due process of law under the above cited Article that the same should be tried and

disposed of under the regular forms of admisitration of justice in the Superior Court in the State of Georgia, where all issues of fact are tried by a jury under the direction of the Court.

(2) That the Supreme Court of the State of Georgia erred in affirming the judgment of the Superior Court of Twiggs County, in denying to Elizabeth Nobles a trial by a jury in said Court, as a function of the said Court, upon the question of sanity or insaity, at the time when the issue was tendered, and *after* sentence was pronounced.

This judgment of the Supreme Court of the State of Georgia, affirming the judgment of the Superior Court of the County of Twiggs was a denial to Elizabeth Nobles of due process of law, such as is required by Section I, Article XIV, of the Amendments to the Constitution of the United States ; and the Court erred in not holding and deciding that at this stage of the proceedings *after* sentence was pronounced, when the issue of insanity was tendered, that it was the duty of the Superior Court of the County of Twiggs, and an essential to due process of law under the above cited Article that the same should be tried and disposed of under the regular forms of administration of justice in the Superior Courts of the State of Georgla, where all issues of fact are tried by a jury under the direction of the Court.

(3) Because the Supreme Court of the State of Georgia erred in holding and deciding that " there is no law of force in this State which makes it incumbent upon a Judge of the Superior Court, at the time when judgment is to be entered, or after it has been entered, to allow or order a judical investigation concerning the mental condition of one against whom a lawful verdict of guity has been rendered in a capital case, and who has thereby become subject to the penalty of death ; nor in either instance is a refusal by such Judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of " due process of law. "

Plaintiff in error says that it is and was by the settled princi-

ples of the law of the land a right on part of a defendant charged with and convicted of a crime, not to be sentenced if insane, and not to have sentence executed if the same be imposed, and that a judicial investigation of the mental condition of one against whom lawful verdict of guilty has been rendered in a capital case, at the time when sentence is to be imposed is an essential to "due process of law," in ascertaining whether or not said sentence should be imposed, and when imposed, whether or not the same should be enforced, and that a refusal by a Judge to enter upon an investigation of this kind with the aid of a jury or without the aid of a jury, in a denial of due process of law.

(4) That the Supreme Court of the State of Georgia erred in holding that the provisions of the Code of the State of Georgia, relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

This holding was erroneous because the provisions of the Code relating to inquisitions in such matters are not judicial proceedings, and do not take place before any judicial tribunal ; there is no judge who is to preside and rule upon the law and the evidence ; there is no method of compelling the attendance of witnesses ; there is no provision for a review of the proceedings ; because no jury is empanelled in any Court ; because the trial of this sort of issue is a function of a trial court ; because no rules of evidence nor methods of proceedings are provided, and no methods for the drawing and summoning and empanelling of a jury; because no judge or presiding officer is charged with the duty of instructing the jury; because said proceedings are not known to the common law for the ascertainment of facts involved, and because the Supreme Court of the State of Georgia has held that said proceeding is not a judicial proceeding, but is a mere inquisition from which there is no appeal.

For each and all of these reasons, if the proceedings contemplated by the Code of the State of Georgia are sufficiently comprehensive to cover all cases where the insanity begins at any

time after the rendition of the verdict of guilty, the said proceedings do not afford such due process of law as is required by Section I, Article XIV, of the Amendments to the Constitution of the United States and the holding that there is no other method of procedure under the law of the State of Georgia is a denial of due process of law, within the meaning of said Section I, Article XIV, of the Amendments to the Constitution of the United States.

(5) The Supreme Court of the State of Georgia erred in holding against the Plaintiff in Error upon the ground that it is a right, privilege and immunity of Elizabeth Nobles not to receive judgment or execution while insane, and a denial to her of such trial and proceedings as are judicial in their character, is a denial and abridgment of Elizabeth Nobles' rights, privileges and immunities as a citizen of the United States, within the meaning of Section I, Article IV, of the Amendments to the Constitution of the United States.

(6) Because the Supreme Court of the State of Georgia erred in holding that a refusal to enter upon an investigation of this kind tendered in this case, *without the aid of a jury*, is not a denial to the prisoner of "due process of law."

Plaintiff in Error say that when the suggestion of insanity in bar of sentence is made, that it is the duty of the tribunal having jurisdiction of the case, to ascertain in some mode and manner, either with or without the aid of a jury, the truth of the issue tendered, and that a refusal to ascertain in any manner, is a denial of due process of law, within the meaning of Section I, Article XIV, of the Constitution of the United States.

(7) The Supreme Court of the State of Georgia erred in holding that a refusal to enter upon an investigation into the sanity of the prisoner when about to be sentenced, when the suggestion of such insanity is made, *with the aid of a jury*, is not a denial to the prisoner of due process of law.

Plaintiff in Error says that where according to the settled

procceedings of the State for the ascertainment of matters of fact in the Courts, a method other than a jury is provided, that whenever any issue is tendered involving a question of fact in a case over which a court has jurisdiction, and while it has jurisdiction, it is a denial of due process of law not to ascertain the facts in the ordinary manner provided by the law of the State, and that in this case, a failure or refusal to enter upon an investigation with the aid of a jury was a denial to the prisoner of due process of law.

(8) That the Supreme Court of the State of Georgia erred in holding that it is no denial of due process of law for the Courts of the State of Georgia and for the Superior Court of the County of Twiggs to refuse in any way to pass upon the issue involved, the court holding in this case, that there was no duty of any character whatever upon the Superior Court of Twiggs to investigate the issue at all, either by the Judge alone or by the Judge and jury combined.

(9) The Supreme Court of the State of Georgia erred in not reversing the judgment of the Superior Court of the County of Twiggs denying to defendant an investigation into her sanity, when the same was tendered both before the imposition of sentence and after its imposition, a' d erred in not holding and deciding that the failure of the Superior Court of the County of Twiggs to investigate the issue tendered both before and after sentence was imposed was a denial to Elizabeth Nobles of due process of law, and a denial of a right, privilege and immunity of the said Elizabeth Nobles as a citizen of the United States under Section I, Article XIV, of the Amendments of the Constitution of the United States.

I.

By the common law at any stage of a criminal case, and especially in capital cases, whether before indictment, upon arraignment, during trial, at verdict, prior to judgment, or even in the shadow

of the gallows, the proper suggestion of the present, existing insanity of the defendant as an immunity from further proceedings against him as long as his malady continued, and also a *trial in some way* of the issue tendered at these respective stages, was his *legal right* and was not extended as a mere matter of *judicial grace*. In doubtful cases the issus was always submitted to a jury.

4 Blackstone 24, 25, 396.
1 Hales P. C. 34, 35.
Rex v. John Frith, 22 Howell's St. Tr. p. 310, 317, 318.
Queene v. Goode, 7 Adolp. & Ellis p. 536 and notes.
Regina v. Dwerryhouse, 2, Cox Cr. Law Cases p. 446.
Carr's Tr. Lunatices p. 35.
Buswell on Insanity p. 455 *et seq.*, 457, 461 et seq.
Clark's Crim. Pro. 149.
Bishop's New Crim. Pro. 666, 667.
Russel on Crimes.

The reason of the rule which made it a right: Chilty's criminal Law, 761,; Hales P. C. 34; Freeman v. People, 4, Denio, 20,; Harg. St. Tr. 205.

II.

The common law rule and its methods of application have been incorporated into the state systems.

Freemen vs. People, 4 Denio, p. 9 (N. Y.)
Carr's Tr. Lunatics, p. 35 "By the New York Code", etc.: ib. 45 (lst half of notes); ib. 39 (enumeration of state statutes) and p. 93 n. 2.
Croker v. State, 60 Wis. 556.
State v. Vann, 84 N. C. 723.
State v. Peacock, 50 N. J. Law Rp. 34.
People v. Farrel, 31 Cal. 576 (1 h. n).
Guagando v. State, 41 Tex. (2 & 3).
Commonwealth v. Bucieri, 153 Penn. St. Repp. (last h. n.).
La. Ann. Rps., Vol. 45 p. 696 (1, 2, & 3).
Gruber v. State, 3. W. Va. 699.

III.

This rule obtains in Georgia because the common law is there in force; and the rights and immunities of insane persons, as well as the methods to establish them at least at two of the many stages of a criminal proceeding are there expressly recognized by legislative enactments and codifications and are cumulative of the common law methods. Hence, the denial of the

right by the Judge of Twiggs Superior Court, when the issue was properly tendered in bar of judgment, was a denial of due process of law.

Code s. 3612. *Collateral issues, how tried*: "All collateral issues in the Superior Court, unless otherwise directed by law, shall be tried by a special jury."

Code s. 4296. *Lunatics*: "A lunatic or person insane without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he or she may be charged, x x x."

Code s. 4297. *Idiots*: "An idiot shall not be found guilty *or punished* for any crime or misdemeanor with which he or she may be charged.

Code s. 4299. *Plea of insanity, how tried:* "Whenever the plea of insanity is filed it shall be the *duty* of the court to cause the issue on that plea to be first tried by a special jury, x x x."

Code s. 4673. *Lunacy and insanity*: "No lunatic, or person afflicted with insanity, shall be tried, or put upon his trial for any offense during the time he is afflicted with such lunacy or insanity, which shall be tried in the manner hereinbefore pointed out, where the plea of insanity at the time of offense is filed, and, on being found true, the prisoner shall be disposed of in like manner."

Code s. 4695. *Oath of inquest of insanity*: "On the trial of the question of insanity arising after the person shall have been *Condemned to die*, provided for by s. 4666 of this Code, the following oath shall be administered to the jury, to-wit: "You and each of you, do solemnly swear (or affirm) that you will well and truly try this *issue of insanity between the State and A. B., now condemned to die* and a true verdict give according to evidence. So help you God.""

Code s. 4666. *Become insane after conviction*: Quoted in full, *antea*.

From these Code sections it is concluded:

(*A*) In Georgia the common law method was intended to apply till *after sentence*.

Section 4666, applies only *after sentence*. Why? Because the section itself says "if after any *convict* shall have been *sentenced* to death", etc. True the next section, 4666 (a), uses the word "convicted" in the place of "sentenced" and at casual glance might indicate that this inquisition of s. 4666 would apply as well at the stage after conviction as after sentence, but not so when it is noted that s. 4666 (a) refers for terms back to s. 4666 and must be construed as and with s. 4666. Besides, s. 4666 is a codifica-

tion and has existed is the Digests and Codes of Georgia since about 1823, while s. 4666 (a) *et seq.* were added by legis'ative enactment in 1874 for the sole purpose of adding some necessary appendages to s. 4666 that consequences flowing from its exercise might be provided for. So, we say, the use of the word "convicted" in s. 4666 (a) is legislative carelessness and really means "sentenced".

A further argument is found in the oath which the jurors take when proceeding under s. 4666. This is quoted 4695, *autea*, and uses the expression "here now condemned to die". Sentence condemns, not verdict. A judge condemns with a sentence while a jury only convicts with a verdict. A jury may find a verdict of guilty in a capital case and the prisoner not be "condemned to die" because in some cases the Judge has power to commute the punishment to life imprisonment. A jury may, by recommendation, prevent the death penalty *in all cases*, but the jury cannot, by withholding a recommendation, enforce the death penalty *in some cases*. There is no condemnation to die till the imposition of sentence. So, s. 4695, which prescribes the oath for s. 4666, is further evidence that this inquisition applies only after *sentence*.

And further, it seems reasonably plain from a study of these code sections that the Georgia lawmakers did intend one thing and did not intend another thing; that is, they *did* intend to codify the frame-work of the common law system relating to insanity and leave the completion ot the legal structure to the judicial hand, with no purpose by providing for the assertion of the right at one stage of the proceeding to bar its assertion at another to exclude that which was not expressed; they *did not* intend to destroy the harmony of the system till the stage *after sentence* was reached, when, by the provisions of s. 4666, (the prisoner being then under sentence and out of the presence of the court and there being no further immediate jurisdiction over him—so to express it—as at common law, when only four days intervened between sentence and execution,) the codifiers ousted the Judge

and turned the matter over to the Ordinary, and to the Sheriff who had the prisoner in charge. All for convenience. In other words no change in the common law system was intended till the prisoner left the Court room under sentence of death. From whence, it is insisted, that there was as much right to a hearing on the issue of insanity before the presiding judge and a jury, or without a jury, at the state between verdict and judgment as at the preliminary stage of arraignment where it is made the *duty* of the judge to call a special jury and try the issue.

The judicial hand, then, must take materials from the common law pile and fill in the apparent gap between verdict and judgment.

(*B*) **The issue is one of legal right.**

Can there be any doubt that the assertion of insanity and a trial of the issue thus made is, or ought to be, a right as at common law. Sections 4296, 4297, 4299, 4673 and 4666 give positive recognition, and all the Code provisions viewed together and considered as a system in the light of the common law indicate it strongly. Section 4696 affords a peculiar mark of it: The jurors are sworn just as upon a bill of indictment "to try the issue between the State and A. B." An issue supposes a right. There would be no issue "between the State and A. B.," if A. B had no right and society was the only party concerned in the proceeding.

IV.

The tribunal established by s. 4666 *et seq.* of the Georgia Code (quoted in full, *antea*) is not a judicial tribunal but is a mere inquisition and its proceedings, whatever they may be, do not afford, but do deny, due process of law for the establishment of insanity.

When at the stage beyond judgment, the codifiers lopped off this function from the trial court, it was their duty to intrust it to a substitute competent to exercise the function. Hence the common law method was properly invoked even *after* sentence and its denial was a denial of due process of the law.

Spann v. State, 47 Ga. 549 *et seq.*
Carr v. State, 98 Ga. p. 89 *et seq.*
An elaborate discussion of "due process," Hurtardo v. Cal., 110 U. S. 516 *et seq.*

The test is: not that the citizen's right *may* be obtained by the method established but that the method shall *insure* those rights.

Billings v. State, 43 Am. St. Rps. p. 525 *et seq.* (An important case.)

Section 4666 does not insure attendance of witnesses, impartial jury, presiding judge, etc.—all *fundamental rights* and not *mere forms.*

Within the principle of Brown v. Levee Commissioners, 50 Miss. 468.

Nor is the test: that the codifiers or the legislature have sanctioned s. 4666, that there will be a hearing and that it will operate on all alike, for the *result* will not be due process.

Within the principle of the Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 237 *et seq.* and Mr. Justice Brewer's dissenting opinion.

V.

Since the right to set up insanity both before and after judgment, and the immunity from judgment in the one case and execution in the other which its successful establishment would afford, was a fundamental and inalienable right of the prisoner at common law, then the holding that such was not the law in Georgia, that there was no such right in Elizabeth Nobles and no duty upon the Judge of Twiggs Superior Court to allow it, was not only a denial of due process of law, but a denial and an abridgement of her rights, privileges and immunities as a citizen of the United States which the States are inhibited to do.

14 Am. U. S. Const. Sec. 1.
Freeman v. People, 4 Denio, p. 9.

The right to set up insanity is inalienable and is, by implication, part of the Bill of Rights.

Carr's Tr. Lun. p. 44 (n. 1 and citations); ib. p. 70.

It is a right reserved by Art. 9 of the Bill of Rights of the United States Constitution and as much protected as immunity from "search and seizure" according to the principles contended for in:

Spies v. Ill. 123 U. S. p. 131, 151, 152, 153, 166, 180, 181.
Landon's Const. History p. 102, 294-5-6.

At common law the record must show that the prisoner was present and was asked if he had aught to urge against the judgment. Its omission was a denial of "due process of law." How much more important is the right to assert insanity at this stage! How much more essential to due process of law!

Ball v. United States 140 U. S. 119, 129 30-31.
Schwab v. Berggren 143 U. S. 442, 448.

Besides, the prisoner is not *present* in court within the meaning of the authorities, unless his *mental* self is there. The constitutional provisions guaranteeing the right of the prisoner to be present at all stages of the trial is "clearly addressed to his *mental*, even more than to his physical, self." Otherwise the guarantee is a mockery and is mere sound, "signifying nothing."

SUPREME COURT OF THE UNITED STATES.

W. W. BAUGHN, NEXT FRIEND OF ELIZABETH HOUSE,

Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error.

In Error to the Supreme Court of Georgia.

Brief and Argument of Counsel for Defendant in Error.

ATLANTA, GA.:
THE FRANKLIN PRINTING AND PUBLISHING CO.
Geo. W. Harrison, State Printer, Manager.
1897.

Supreme Court of the United States.

W. W. BAUGHN,
Next friend of Elizabeth Nobles, Plaintiff in Error,

vs.

STATE OF GEORGIA,
Defendant in Error.

No. ..... October Term, 1897.

In Error to the Supreme Court of Georgia.

Brief and Arguement of Counsel for Defendant in Error.

STATEMENT OF FACTS.

At a special term of the Superior Court of Twiggs county, Georgia, in July, 1895, Elizabeth Nobles was convicted of murder and sentenced to death. A motion for a new trial upon several grounds, including that of insanity at the time of the commission of the offense, was made, pending which the sentence of death was suspended. A new trial was refused by the Court, and the case was then taken by writ of error to the Supreme Court of Georgia, where the judgment of the Court below was affirmed on the 13th day of January, 1896. See 98 Ga. 73.

On the 23d day of January, 1896, W. W. Baughn, as next friend of Elizabeth Nobles filed in the Circuit Court of the United States for the Southern District of Georgia an application for writ of *habeas corpus* against the officers of the law having custody of said Elizabeth Nobles, alleging therein that said Nobles was insane, and

that she was about "to be sentenced to death and about to be executed and deprived of life without due process of law and in violation of the 14th amendment to the Constitution of the United States." On the 4th day of February, 1896, the Circuit Court dismissed the application and discharged the writ which issued thereon. From this judgment an appeal was taken to this Honorable Court, and on the 4th day of May, 1896, the said case, which was No. 927, October term, 1895, was dismissed pursuant to the 10th Rule. See 163 U. S. 677.

On the 23d day of June, 1896, the said Elizabeth Nobles was carried before the Superior Court of Twiggs county, Georgia, for the purpose of being resentenced, as provided by the laws of the State, and when the said case was called for that purpose, W. W. Baughn, as next friend of Elizabeth Nobles, presented his petition to the Court objecting to the imposing of the sentence, for the reason that the said Elizabeth Nobles was then insane, and praying the Court to summon and impanel a jury to determine the question as to her insanity. The petition also alleged that unless such question was submitted by the Judge of the Superior Court to a jury in that Court, that "due process of law" under the 14th Amendment to the Constitution of the United States would be denied to her. The Court overruled this petition and denied same, to which ruling the petitioner excepted, and notwithstanding said objections, sentenced Elizabeth Nobles to be executed on August 7th, 1896. After said sentence was imposed and at the same term of the Court, said Baughn, as the next friend of Elizabeth Nobles, presented to the Court another petition containing the same allegations and praying that the sentence of death should not be executed. This petition or motion was likewise overruled, and to this ruling or judgment petitioner also excepted. A bill of exceptions to said rulings was then

presented to the Judge of said Court, which was properly certified, and the case was then taken to the Supreme Court of Georgia, where on the 12th day of May, 1897, the case was disposed of by affirming the judgment of the Court below. The head-notes of the decision being as follows :

"1. There is no law of force in this State which makes it incumbent upon a judge of the superior court at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisioner of 'due process of law.'"

"2. The provisions of the Code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

"Judgment affirmed.

"All the justices concurring."

The opinion of Mr. Justice Cobb in the case not having yet been published, it is hereto attached as an appendix.

Section 1047 of volume 3 of the Code of Georgia is as follows :

"If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity. The following oath shall be administered to the jury, to wit : 'You and each of you do solemnly swear (or affirm) that you will well and truly

try this issue of insanity between the State and A. B., now condemned to die, and a true verdict give according to the evidence. So help you God.' If it be found by the inquisition of such jury that the convict is insane, the sheriff shall suspend the execution of the sentence, and make report of the inquisition and suspension of execution to the presiding judge of the circuit, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had.'

BRIEF OF ARGUMENT.

The position of Elizabeth Nobles is the same as if she, after conviction and sentence, made application to the superior court to have her mental contition submitted to a jury therein.

Neither the Constitution of the United States nor of the State of Georgia guarantees to a person convicted of crime, who may thereafter become insane, the right to have judicially determined the question of sanity. Neither does the common law guarantee such a trial as a matter of right. At common law the stay of execution depends on the discretion of the judge. 1 Hale, 370; 4 Blackstone's Com. 395; 1 Hawk. P. C. 3; Bonds v. State, Mart. & Yerg. 492 (bottom number); 13 Ala. 153; 84 Pa. 200; Carr's Trial of Lunatics, 87. As was said by McCoy, ~~Judge~~ Justice, in 47 Ga. 551, "The whole proceeding at common law is merely a stay of execution, and is based rather upon the public will and a sense of propriety than any right in the prisoner." The question as to whether a person who is convicted of murder, and sentenced to death, and afterwards becomes insane, shall be punished as prescribed in the sentence is purely a police question, and when a State by its laws provides for an inquisition to inquire into the sanity of such person, all requirements, both as to the rights of the prisoner, and as to public propriety and decency are fully met.

The due process of law which the constitution requires was given to Elizabeth Nobles by the State of Georgia and the courts thereof in the trial had in Twiggs Superior Court upon the charge of murder, where a verdict of guilty was rendered, which verdict was upheld by the supreme court of the State. By that verdict it is declared that she has forfeited her life, and if since its rendition and her sentence thereunder, she has become insane, it is

purely a police question as to what shall be done in the matter of staying her execution. In the case of Carr *v.* the State, 98 Ga., 89, it was held that proceedings under section 1047 of the Code, "are in the nature of an inquisition and are not judicial in character, and there is no provision of law for reviewing the same." For this reason appellant says that the means afforded by the laws of Georgia to determine this question do not constitute due process of law. The right of review or the right of appeal to a higher court is not a matter of absolute right. 153 U. S. 684; 148 U. S. 657. In 149 U. S. 645, and 110 U. S. 516, it is held that due process of law does not require an indictment by a grand jury if the constitution of the State authorizes prosecution by information. The case of Dent *v.* West Virginia, 114 U. S., very clearly defines what legislation is open to objection as depriving one of his rights without due process of law; also 139 U. S. 499, and the same, 446, will be found very much in point.

In the case of Duncan, 152 U. S. 377, it was held that due process of law was secured if the laws operate on all alike, and are not the arbitrary exercise of the powers of the government. Mr. Chief Justice Fuller, speaking for the court, says on page 382: "But the priveleges and immunities of citizens of the United States, protected by the 14th amendment, are priveleges and immunities arising out of the nature and essential character of the Federal Government, and granted or secured by the constitution; and due process of law and the equal protection of laws are secured if the law operates on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Section 1047 of the Code of Georgia is by no means the arbitrary exercise of the powers of government. It makes ample provision for an inquisition to inquire into

the sanity of a person convicted of crime. At common law an inquisition rested solely within the discretion of the judges. The provisions of the Georgia statute are such that certain officers may be compelled to grant the inquisition, hence it is far more humane and liberal than the common law. The Georgia plan is also far more humane than that of many of the States. As to the manner of dealing with insane convicts under sentence of death, see Carr's Trial of Lunatics. As to Iowa, see page 74, Kansas, page 76, Massachusetts, page 78, Minnesota, page 78, New York, page 80.

J. M. TERRELL,
Of Counsel for Defendant in Error.

Atlanta, Ga.

APPENDIX.

After stating the facts and citing the sections of the Georgia Code and several decisions of the Georgia Supreme Court, Mr. Justice Cobb concludes the opinion of the Court as follows :

"We therefore treat this as the application of a person convicted and sentenced to have the question of her mental condition tried by a jury in the Superior Court according to the forms of procedure incident to investigations in that Court. Has a convict the right, after verdict and sentence, and his life according to "due process of law," thus forfeited to the State, to demand as "due process of law " that his mental condition shall be inquired into, in order to determine whether the judgment of the Court shall go into execution ? "Inasmuch as the stage of criminal procedure known as pleading has been passed at the time when, after conviction, the issue as to insanity in bar of sentence is asked for, the point as to constitutional right may not be involved. Carr's Trial of Lunatics, page 87. In the case of Laros v. Commonwealth, 84 Pa. St., pp. 200, 210, the Court says : "The last three assignments of error raise a single question upon the power of the Court to inquire by inspection and per testes into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defense to conviction, subsequent insanity cannot be set up in disproof of conviction. The plea at this stage is only an appeal to the humanity of the Court to postpone the punishment until a recovery takes place, or as a merciful dispensation."

"The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exists at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with a due administration of justice. There must be a sound discretion to be exercised by the Court. If a case of real doubt arise, a just Judge will not fail to relieve his own conscience by submitting the fact to a jury."

It is in the power of any person interested in the prisoner to call for an investigation under the Penal Code, section 1047, or the judge himself may order the investigation. The purpose of the legislature evidently was to carry out the principal referred to in the decision above quoted, and provide a method for the trial of a question which simply involved a plea to the humanity of the court to postpone the punishment of an insane person until a recovery takes place.

In the case of Jones *v.* the State, 13 Alabama, 153, the court, in dealing with the question of insanity at the time of trial, says : "Although we are of opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary enquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which surrounds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken and try an insane man (as we think has been done in the case before us) it will present a case in which there may be a strong appeal to executive clemency."

In the case of Spann *v.* the State, 47 Ga. 551, in referring to the law now contained in Penal Code, section 1047, Judge McCay says : "The stay for insanity

seems to depend on the discretion of the judge at common law." 1 Hale, 370. "He may call in a jury if he pleases. The whole proceeding is merely a sta yof execution, and is based rather upon the public will and a sense of propriety, than on any right in the prisoner. * * * The whole proceeding is rather an inquiry based on public propriety and decency than a mattar of right." While the question as to whether the section under consideration was due process of law is not involved directly in the case of Carr *v.* the State, 98 Ga., still in passing upon the right of the superior court to review a proceeding under that section by certiorari, the majority of the court recognized the proceeding as being "rather an inquiry based on public propriety and decency, than upon any right of the defendant." The effect of that decision was to hold that no judicial investigation was required to be given to a person as a matter of right, and that all investigations after conviction were simply to inform the court imposing the sentence as to the mental condition of the prisoner for the sole purpose of determining whether it would be consistent with public decency and propriety to take away the life of a person who had not mind enough to realize what was being done.

There being no law of force in this State which authorizes or requires the judge of the superior court to enter into an investigation of the mental condition of Elizabeth Nobles at the time and in the manner prayed for in the petition filed in her behalf, the refusal by the judge to enter into such investigation was not a denial to her of "due process of law"; and there was, therefore, no error in declining to entertain such petition, and in denying "each and every prayer" therein. Judgment affirmed.

NOBLES *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 376. Argued November 9, 10, 1897. — Decided November 29, 1897.

This court follows the construction given by the Supreme Court of the State of Georgia to the statutes of that State called in question in this case.

If, after a regular conviction and sentence in that State, a suggestion of a then existing insanity is made, it is not necessary, in order to constitute "due process of law," that the question so presented should be tried by a jury.

THE case is stated in the opinion.

Mr. Marion W. Harris for plaintiff in error. *Mr. W. C. Glenn* and *Mr. D. W. Rountree* were on his brief.

Mr. J. M. Terrell for defendant in error.

Mr. Justice White delivered the opinion of the court.

In July, 1895, Elizabeth Nobles was tried in the Superior Court of Twiggs County, Georgia, upon an indictment for murder, and was found guilty and sentenced to death. The bill of exceptions in the record now before us recites that "the said sentence of death having been regularly and legally suspended and superseded by the order of the court the case came on again to be heard before the court on the 23d day of June," the object of the hearing being, as stated, "for the purpose of passing sentence of death by the court upon the said Elizabeth Nobles in said stated case;" that is to say, in consequence of the order which had suspended the sentence of death previously imposed in July, 1895. On the date of the appearance for resentence, June 23, 1896, W. W. Baughn, the present plaintiff in error, appeared on behalf of the convict and presented a motion or petition. The paper recited that the said Elizabeth Nobles should not be sentenced —

"First, because, as petitioner avers, the said Elizabeth Nobles is now insane.

"Second, because the said Elizabeth Nobles being now insane, it is contrary to the policy of the law and is illegal that the sentence of death should be imposed upon her by the court.

"And petitioner further says that under article 14 of the amendments to the Constitution of the United States, it is provided as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Petitioner says that due process of law means law in its regular course of administration through courts of justice, and that by the Fourteenth Amendment above quoted, whilst the States have power to deal with crime within their borders, no State can deprive any person of equal and impartial justice

under the law, and that law in its regular course of administration through courts of justice, is due process, and unless the same take place through courts of justice, the constitutional requirement above quoted is nullified.

"Petitioner, therefore, specially sets up and claims the right of due process of law through its regular administration through courts of justice, under and by virtue of the constitutional guarantee under the Fourteenth Amendment to the Constitution of the United States above quoted.

"Petitioner says that it is essential to due process of law within the meaning of the above requirement that a jury be empanelled on the issue now tendered by this petition, and that trial take place before a judge of the Superior Court of the State of Georgia, according to the due and regular form of proceedings in our courts. Whenever an issue of fact is made in a Superior Court in the State of Georgia the trial of the questions thereby raised is a function of the Superior Court of the county having jurisdiction, and that the trial of the question raised by this petition is a function of the Superior Court of Twiggs County, in which said court the said Mrs. Nobles was convicted of murder.

"Petitioner further says that the proceedings contemplated under section 4666 of the Code of Georgia are not due process of law for these reasons, to wit."

The grounds alleged were eight in number, and in substance charged that the method of inquiry provided by the Georgia statutes for ascertaining whether one who had been convicted of crime was insane at the time of the inquiry was not due process of law under the Constitution of the United States, because the investigation which the law authorized was not judicial in character. The detailed enumeration of why the remedy provided by the statute was asserted in the petition not to be judicial as well as the prayer of the petition are set out in the margin.[1]

[1] "1st. Because the same does not take place in any court of this State.

"2d. Because no rules of evidence or method of procedure are prescribed in such inquisition, and no proper method for the drawing, sum-

Opinion of the Court.

The court refused to grant the petition, and resentenced the prisoner to the death penalty. Thereupon the petition was again presented, and upon its being again refused, exceptions were noted. The case, on the exceptions reserved, as just stated, was taken to the Supreme Court of the State of Georgia, where the action of the lower court was affirmed, and to this judgment of the Supreme Court of the State of Georgia this writ of error is prosecuted. There is no question

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moning and empanelling a jury, and for the subpœnaing and examination of witnesses is provided.

"3d. Because no judge or presiding officer is charged with the function of ruling in or out evidence which may be tendered on said issue.

"4th. Because no judge or presiding officer is provided in said proceeding whose duty it is to instruct the jury on the law involved in the questions raised and to make rulings on evidence which may be tendered for or against the person said to be insane.

"5th. Because there is no method of moving for a new trial or of correcting any errors which may take place in said proceeding.

"6th. Because said proceeding is one not known to the common law in ascertaining the facts involved according to the settled principles of the law of the land.

"7th. Because the Supreme Court of the State of Georgia has held that the said proceeding is in no sense a judicial proceeding, but is a mere inquisition from which there is no appeal.

"8th. Because no manner of review whatever is permissible from the findings of said inquisition.

"9th. Because the proceedings before said inquisition do not take place before a court in the due course of the administration of justice. And petitioner says that the inquisition provided for a denial by the State of such due process of law as is guaranteed by the Constitution of the United States, and petitioner especially claims the privilege and right, under the United States Constitution, to have due process of law for the ascertainment of the truth of the issue now here tendered to the court.

"Petitioner further says that by the settled principles of the common law the ascertainment of the fact of sanity or insanity at any stage of the proceedings in the course of a legal investigation was a function of the trial court; that is, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or after conviction and before execution, or before or after judgment, and that the settled and orderly course of procedure was the summoning of a jury and a trial of this issue under the forms of law, by introduction of evidence under the rulings of the judge of the said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict. And petitioner says that each

raised that the statutes of Georgia do not afford adequate means for trying by court and jury any question made as to the insanity of the accused at the time of the commission of a crime.

The statute law of Georgia directly applicable to and involved in this controversy is as follows:

Georgia Code (1882), 4666; Code (1895), 1047, 1049. *Become insane after conviction:* "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the Ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found, by the inquisition of such jury, that such convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution, to the presiding judge of the district, who shall cause the same to be entered on the minutes of the Superior Court of the county where the conviction was had. And, at any time thereafter, when it shall appear to the said presiding judge, either by inquisition or otherwise, that the said convict is of sound mind, the said judge shall issue a new warrant, directing the sheriff to do exe-

and all and every one of these proceedings named, and also the right to the court's process for the compelling the attendance of the witnesses to testify upon said issue, as well as such other proceedings and process and rights as are usually incident to trials before the Superior Courts of the State, are essential to due process of law within the meaning of the Constitution of the United States, and petitioner now here claims the right to such proceedings under and by virtue of the Fourteenth Amendment to the Constitution of the United States.

"Wherefore, petitioner, now in behalf of the said Elizabeth Nobles, whom petitioner avers is mentally incapacitated because of her present insanity to take any legal steps in her own behalf, the premises considered, prays the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and empanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; and that petitioner have the right to the court's process to compel the attendance of witnesses and to such other processes as may be right and necessary, and that said sentence be postponed and suspended till the final adjudication of the question raised by this petition."

cution of the said sentence on the said convict, at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant, and other proceedings in the case to be entered on the minutes of the said Superior Court."

The provisions of this section are a reproduction in the Code of prior legislation (Georgia Acts of 1855–6, p. 36; 1859, p. 50):

Georgia Code (1882), 4666*a*; Code (1895), 1048. *Lunatics, how disposed of*: "When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of section 4666 of the code, it shall be the duty of the judge to certify the fact, and the said convict shall be received into the lunatic asylum, there to be safely and securely kept, and treated as other adjudged insane persons."

The provisions of this section are a reproduction in the Code of an act passed in 1874. (Georgia Acts of 1874, p. 30.)

The above sections, as existing in the Georgia Code of 1882, were cited by the Supreme Court of Georgia as controlling, and the brief for the plaintiff in error also states this to be the case. We have given the corresponding sections in the Code of 1895, although such sections as reproduced in the latter Code are in three sections and are somewhat altered in phraseology, but not so as to be material to the issue before us.

In the argument at bar the contention was that these sections of the Georgia law afforded an opportunity to investigate the question of the insanity of a person convicted of crime only when the suggestion of insanity was made after conviction and sentence, and, therefore, that the statutes furnished no means of testing the question of insanity arising after conviction and before sentence, and this fact, it was asserted, amounted to a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. The construction of the statutes upon which this proposition was predicated is as follows: Although the text of section 4666*a*, which provides for an investigation into the question

of insanity, when "any person shall, after conviction of a capital crime, become insane," is conceded to be broad enough to cover all cases arising between conviction and sentence, yet, the words "after conviction" it is urged should be construed as applying only to insanity arising after conviction and sentence, because section 4666 provides only for an investigation "after the convict shall have been sentenced." That is to say, the construction contended for, instead of treating the two sections of the code as in *pari materia*, and construing them together so as to give effect to both, restricts and limits the natural and obvious meaning of the later statute by incorporating into it the provisions of the earlier one. If the contention that the words "after sentence" in the earlier statute only apply to cases where insanity is suggested after sentence, and not to those where it is claimed to have arisen between conviction and sentence, then the provision in the subsequent section, extending the remedy to cases arising "after conviction," cured the omission, if any there was, in the first statute. Instead, then, of construing the earlier as controlling the later statute, the elementary rule of interpretation would require that the later be considered as amplifying and providing for the thing omitted in the prior statute. While these conclusions are obvious, we are nevertheless relieved from the necessity of so deciding, since the opinion of the Supreme Court of the State in the case before us expressly holds that "the provisions of the code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty." We follow the interpretation given by the Supreme Court of the State of Georgia to the statutes of that State.

Indeed, the question which arises on the record does not require a consideration of what would be due process of law under the Fourteenth Amendment where insanity was suggested between verdict and sentence, or even at the time of sentence. This results from the fact that the suggestion of insanity relied on was made, not at the time of sentence, but long after the sentence had been imposed. As stated, the bill

of exceptions recites that the accused had been sentenced to death at the term of court where the verdict of guilty was found, that is, in July, 1895, and that when called into court again, in June, 1896, it was for a resentence upon the verdict, because of the previous sentence "having been regularly and legally superseded by the order of the court." In the opinion of the Supreme Court of Georgia in this case it finds this fact and holds that under the Georgia statutes the proceeding had in June, 1896, although called a resentence, was in legal effect but a fixing of a new date for the execution of the previous sentence, the date fixed in the prior sentence having expired. In other words, the Supreme Court of Georgia holds that the prior sentence remained in force, and that the subsequent action of the court was but a mere fixing of the date for its execution. We take notice of the finding of fact, *Egan* v. *Hart*, 165 U. S. 188, and follow the legal conclusions of the court, and are bound by them, since they involve but a construction by the court of last resort of the State of Georgia of the statutes of that State regulating the effect of a resentence in case the date fixed in a former sentence has lapsed.

From these considerations it follows that the only question which we are called upon to determine is whether, after a regular conviction and sentence, a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and *quasi* judicial process is created for the purpose of investigating the suggestion. Without analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the

will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial. Nor is this so extreme a possibility that it should not be supposed, since in the argument at bar it was admitted that the sentence first imposed was suspended because the record was taken to the Supreme Court of Georgia, where the question of the existence of insanity was either directly or indirectly adversely decided.

Blackstone, it is urged, supports the proposition that at common law there was an imperative duty, on the suggestion of the insanity of a convict, to try the issue by judge and jury. The text to which reference is made is as follows (4 Bl. Com. 24, 25):

"Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution."

And 1 Hale P. C. 34, 35, is referred to as being to the same effect. But nothing in these citations is pertinent to the issue under consideration. It is agreed that at common law an insane person was not to suffer punishment. The question here is, what, after conviction and sentence, was the method by which the existence of insanity in the convict was to be ascertained when a suggestion of such insanity was made. In speaking on this subject, Blackstone says (Book 4, p. 395):

"Another cause of regular reprieve is, if the defendant becomes *non compos* between the judgment and the award of execution: for regularly, as was formerly observed, though a man be *compos* when he commits a capital crime, yet if he

becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for '*furiosus solo furore punitur*,' and the law knows not that he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is, therefore, an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him: and if he appears to be insane, the judge, in his discretion, may, and ought to, reprieve him."

In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best. In *Laros* v. *Commonwealth*, 84 Penn. St. 200, where a suggestion of insanity was made after verdict, the court said (p. 210):

"The last three assignments of error raise a single question upon the power of the court to inquire by inspection and *per testes* into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defence to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation.

"The rights of the prisoner as an offender on trial for an offence are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of

justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."

In *Bonds* v. *Tennessee* (1827), Martin & Yerger, 142, the accused was convicted of the crime of murder, and upon being led to the bar and asked by the court if he had anything to say why sentence of death should not be pronounced against him, though his counsel alleged that he was at the time a lunatic, and that sentence could not be passed upon him, and offered to plead his lunacy in bar of the sentence, and further demanded of the court that a jury be called to try the issue of fact arising upon the plea. But the court, upon the inspection of the prisoner and upon consideration of the case — because nothing was shown to render it probable that the defendant was a lunatic, or to make that matter doubtful — refused to allow the prisoner his plea aforesaid, and denied him the privilege of a jury to try the question of his sanity or insanity, and passed upon the accused the sentence of death. In support of his claim that the right to have a jury try the plea of insanity was absolute, and that it was not a matter of choice or discretion with the court to deny the application, counsel for the accused relied upon a statement made in 1 Chitty Cr. Law, 761, to wit, that "The judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane, or merely counterfeits; and, if they find the former, he is bound to reprieve him till the ensuing session." But the reviewing court said: "The meaning of this passage, giving it a reasonable construction, must be that, if upon the question made, the judge is not satisfied, or has doubts, he may call in to his assistance the aid of a jury, and submit the matter to them. The law on this point is more fully stated in 1 Hawk. P. C. p. 3, in the notes, where it is said: 'Every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by the inspection of the court (1 Hale, 33; Tr. per pais 14; O. B. 1783, No. 4); by evidence given to the jury, who are charged to try the indictment, (3 Bac. Abr. 81; 1 Hale, 33, 35, 36; O. B. 1784, No. 283,) or,

being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded, returnable *instanter* in the nature of an inquest of office. (Fost. 46; Kel. 13; 1 Lev. 61; 1 Sid. 72; 4 Comm. Appen. sec. 3.) And this method, in cases of importance, doubt or difficulty, the court will, in prudence and discretion, adopt. (1 Hale, 35.)' From this it appears that inspection by the court is one of the legal modes of trying the fact of insanity, and nothing appears in the record of this case to show that the discretion of the court, in adopting the mode pursued, was erroneously exercised. This court, therefore, is of opinion that there is no error in the matter of the first bill of exceptions." (In making the foregoing quotation we have corrected what seem to be typographical errors in the extract from the marginal note to section 4, chapter 1, book first of Hawkins' Treatise, conforming it to the note as found in the sixth edition, by Leach.)

It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was, therefore, a subject within the control of the State of Georgia. Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the Fourteenth Amendment, a State is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best.

Affirmed.